



OFFICIAL OPINIONS
OF THE
ATTORNEY-GENERAL
OF
The Commonwealth of Massachusetts

PUBLISHED BY THE
ATTORNEY-GENERAL

VOLUME VII

1923-1925

THIS VOLUME CONTAINS
THE OPINIONS OF ATTORNEY-GENERAL
JAY R. BENTON, 1923 - 1925
ALSO TABLES OF STATUTES AND CASES
CITED, AND AN INDEX-DIGEST

PREFACE

This volume is issued by the Attorney-General in pursuance of the authority contained in the Acts of 1928, chapter 405, section 3.

This volume is in substantial uniformity with the preceding volumes. The work of preparation has been in charge of Mr. Louis H. Freese, Chief Clerk.

JOSEPH E. WARNER,
Attorney-General.

Boston, January, 1929.

TABLE OF STATUTES CITED OR REFERRED TO IN THIS VOLUME.

UNITED STATES COMPILED STATUTES.		PAGE
§ 10126		104
§§ 1831-3		557
UNITED STATES REVISED STATUTES.		PAGE
§ 1014		507
§ 5219	542, 543, 544, 548, 549, 654, 655	
§ 5219, cl. 1(e)		551
§ 5278		104, 610
UNITED STATES CONSTITUTION.		PAGE
Art. I, §§ 7, 12		138
Art. I, § 8	137, 138, 173	
Art. I, § 10	11, 137	
Art. IV, §§ 1, 2	609, 610	
Art. IV, § 2	104	
Art. VI	610	
CONSTITUTION OF THE COMMONWEALTH.		PAGE
Dec. of Rights, art. IX	45, 108, 621, 622	
— art. X	12, 13	
— art. XIII	119, 122	
— art. XIX	110, 111, 622, 623	
— art. XXX	51	
Const., pt. 2, c. I, § I, art. III	189	
— — — — — § I, art. IV	92, 110, 123, 132, 189, 447, 621, 622, 625	
— — — — — § II, art. II	108, 701	
— — — — — § II, art. III	625	
— — — — — § III, art. XI	625	
— — — — — c. II, § I, art. IV	624	
— — — — — § I, art. IX	49, 580	
— — — — — § II, art. II	625	
— — — — — § III, art. I	624, 742	
— — — — — § III, arts. V, VI, VIII, IX, XI	625	
— — — — — § IV, art. I	580	
— — — — — § IV, art. II	625	
— — — — — c. III, art. I	126, 581, 625	
— — — — — art. II	594	
— — — — — arts. II, V	624, 625	
— — — — — art. III	107	

CONSTITUTION OF THE COMMONWEALTH — *Con.*

	PAGE
Const., pt. 2, c. VI, arts. I, II	625
Amend'ts Const., art. II	621, 622
— art. IV	107, 128, 581, 625
— art. VI	719
— art. XIV	621
— art. XVI	625
— art. XVII	44, 45, 625
— art. XXXVII	128, 581, 625
— art. XLIV	541, 546, 547, 548, 550, 551
— art. XLVI	67, 76, 77, 502
— art. XLVI, § 2	74, 616, 617, 641
— art. XLVII	246, 250
— art. XLVIII	747, 749
— art. XLIX	181
— art. LVII	582
— art. LVIII	625
— art. LXIII, § 1	131
— art. LXIII, § 5	628
— art. LXIV	44
— art. LXVI	273
— art. LXIX, § 2	694

STATUTES OF THE COMMONWEALTH.

	PAGE		PAGE
1781, c. 17	95	1874, c. 221	145
1793, c. 42, § 6	61	1876, c. 203, §§ 14, 16	346
1795, c. 81	121	1877, c. 218	73
1818, c. 130, § 6	100	1878, c. 214	578
1833, c. 148, § 3	61	— — — § 2	492
1842, c. 60	145	— — — c. 244	675
1844, c. 102, § 1	61	— — — § 3	696
1847, c. 224	675	1881, c. 304, §§ 1-3	41, 303
1849, c. 158, § 1	61	— — — § 6	42
1851, c. 7	500	1882, c. 208	493
1855, c. 414, §§ 2, 4, 5	371	1884, c. 265	505
1860, c. 206	659	1885, c. 323, § 2	675, 696
— c. 217	278	— c. 344, § 3	317
— c. 221, § 3	459	1886, c. 32	73
— c. 3, § 1	455	1887, c. 85, § 15	313
1864, c. 208	300	— c. 252, § 11	460
1865, c. 230	342	1888, c. 318, §§ 2, 4	316
— c. 283	304	— — — c. 349	296
— — — §§ 1, 4, 5	301	— — — § 6	297
1867, c. 275	265	— c. 413	313
— c. 285	145	1889, c. 279, § 2	228
1868, c. 328	342	— c. 282	74
1869, c. 182, § 3	101	— c. 305	367
— c. 384	268	— c. 465, § 1	178
1870, c. 392, § 3	342	1890, c. 315, § 2	313, 314, 315

STATUTES OF THE COMMONWEALTH — *Con.*

	PAGE		PAGE
1890, c. 373	74	1907, c. 574	406
— c. 440, § 8	532	— c. 576, § 75	484, 485
1891, c. 364, § 15	236	— — — § 76	484
1892, c. 404	297	— c. 584	453, 454
1893, c. 407	259	1908, c. 59, cl. 5th	364
— c. 450	297	— c. 390, § 2	319, 322
1894, c. 399	294	— c. 511	490
— c. 481, §§ 41, 42	493	— c. 605	160
— c. 491, § 41	460	— — — § § 1, 2, 3	159
— c. 532	297	1909, c. 419	160
— c. 548	17, 28	— — — § 25	159
1895, c. 488, § 4	671	— c. 439	302
— c. 504	505	— c. 444	359
1896, c. 276	460	— c. 486, § 20	730
— c. 447	536	— — — § § 1, 20, 30	566
1897, c. 165	460	— — — § 30	38
— c. 294, § 1	505	— c. 490, pt. III, § 41	302
— c. 500	28, 338	— — — — — cl. 3rd	306
— — — § 10	31, 32, 339	— — — — — § 57	306, 733, 734
1898, c. 282, § 2	354	— — — pt. 1, §§ 4, 16-18	42
— — — § 3	355	— c. 504, § 62	208, 209
— c. 467	472, 473	— c. 514, § 25	571
— c. 469	557	— c. 527, § 8	498
— c. 496, § 11	371	— c. 534	275
— c. 578	32, 339, 340	— c. 536	238
— — — § 1	30, 31, 32, 248	— — — § 2	397
— — — § 6-10	29, 30, 32	1910, c. 567	347
— — — § 11	31	1911, c. 291	290
— — — § 28	30, 31	— c. 532, § 3, par. (2)	440, 441
1899, c. 408, §§ 6, 42	460	— c. 727, § 3	160
— c. 447	557	— c. 740	19
1901, c. 439	493	— c. 751	74
— c. 525	297	1912, c. 723, § § 1, 2	521
1902, c. 342	302	— c. 726, § 5	146
— c. 483	367, 368	1913, c. 758	146
— — — § 1, 2	364	— c. 803, § § 1, 3	599
1903, c. 322	460	— c. 806	494
— c. 349, § 1	408	— c. 819	113
— c. 437	302	1914, c. 18	320
— — — § 72	304	— — — § 1	319, 323
— c. 465, § 3	661	— c. 437	160
1904, c. 314	698	— c. 795, § 4	710
— — — § 2	97	1915 (Gen.) c. 221, § 5	743
— c. 344, § 1	235	— — — c. 267	236
1905, c. 189	314, 315	— — — c. 268	160
1906, c. 210	697, 698	1916, c. 225	522
— c. 291	697	— — — § § 75, 76	524
— — — § 10	675, 695, 696, 698, 736	— (Gen.) c. 37	314
— c. 479	346	— — — c. 98	383
1907, c. 550	238	— (Gen.) c. 242, § 3	418

STATUTES OF THE COMMONWEALTH — *Con.*

	PAGE		PAGE
1916 — c. 288	558	1920 c. 327, § 2	357
1917 (Gen.) c. 29, § 7	38, 39	— c. 368, § 3	229
— c. 223, § 2	209	— c. 555, § 1	538, 539
— c. 342	244	— c. 560	113, 446
— c. 342, §§ 1, 6, 12	245	— c. 572	743
— § 23	246	— §§ 1, 2, 5	744
— c. 344, pt. V, § 39	599	— c. 610	247
1918 (Gen.) c. 92	557	— c. 628, § 5	247
— c. 116, § 1	599	1921, c. 81	731
— c. 247	698	— c. 123	724
— c. 257, § 261	418, 419	— c. 136	414
— c. 264, § 1	3, 4	— c. 141	414
— (Spec.) c. 158	12	— c. 180	146
— c. 159	11, 16, 17, 18, 19,	— c. 215	431
20, 21, 22, 23, 24, 25, 331, 335, 336,		— c. 248	211, 213
339, 340, 363, 365, 571, 715		— § 1	212
— § 1	714	— c. 280	145, 146, 681
— §§ 2, 17	32	— c. 318	462
— § 5	19	— c. 330	187, 188
— § 6	24	— c. 325	244, 252
— § 11	366, 369	— § 2	247
— § 16	13	— c. 331	188
— c. 188	11, 15, 25, 26, 331	— c. 351	422, 423
— § 19	13, 21	— c. 360	593
— § 20	339, 340	— c. 376	496
1919, c. 295	555	— c. 379, §§ 1, 2	684
— c. 332	303	— c. 386	23
— c. 355, §§ 12, 30	733, 734	— c. 410	422, 423
— (Gen.) c. 9	256	— c. 420, § 1	504
— c. 270	234	— c. 439	709
— c. 283	196, 255	— c. 456	234
— c. 290, § 9	197	— c. 467, § 8	409
— c. 332	304, 305	— c. 474	177
— c. 333, § 5	343	— c. 485, § 5	450, 453
— c. 341	244	— § 45	454
— § 1	246	— c. 497, § 1	660
— c. 349, § 20	733	— c. 499, § 8	165
— c. 350	273, 713	1922, c. 95	294
— pt. III	274, 275, 276	— c. 137	461
— § 10	277	— c. 177	177, 343, 344
— §§ 99, 101	712	— c. 222	177
— § 104	713	— c. 302	86, 87
— §§ 111, 113	558	— c. 339, § 2	724
— § 114	275	— c. 341, § 1	75, 437
— § 115	274	— § 2	646, 647
— c. 355	303, 735	— c. 343	244, 248
— pt. I, § 1	305	— c. 347	387
— §§ 19, 20	217	— c. 349	171
— c. 365	246	— c. 353	457
— (Spec.) c. 83	294	— c. 382	525

STATUTES OF THE COMMONWEALTH — *Con.*

	PAGE		PAGE
1922 c. 393	411	1923, c. 494, item 623 ^b	403
— c. 403	96, 97, 98, 100	1924, c. 19	603, 627
— c. 403, § 1	387	— c. 93	527
— c. 406	509	— c. 152	505
— c. 409	234	— c. 156	461
— c. 427, § 1, sub. sec. 3	125	— c. 165	505
— c. 441	394	— c. 183	651
— c. 449	496	— c. 203	743
— c. 462	287, 288	— — § 2	744, 745
— c. 485, § 8	162	— c. 251	709
— c. 501	402, 403, 405	— — § 4	704, 705
— c. 520, § 9	734, 735	— c. 281	555
— c. 521, § 5	705	— c. 302	747, 748
— — § 9	704, 705	— c. 309	606
— c. 545, § 12	131	— — §§ 1, 2	605
— — § 27	530	— c. 369	731
— — §§ 10, 11	688	— c. 395	721
— — § 5	5	— c. 416	660
1923, c. 145	700	— c. 442, §§ 1, 2, 3, 4, 5	471, 472
— c. 233, § 5	588	— c. 450	556, 649
— c. 252	284	— c. 457	602
— c. 268, § 2	608	— c. 462	454, 456
— c. 285	418	— c. 480	597
— c. 297	431	— c. 492, § 3	518
— c. 320	244, 248	— c. 497	565, 566
— c. 348	671, 672	— — § 2	564
— c. 358	338	1925, c. 18	704, 705
— c. 362	517	— c. 90	704
— — § 1, 5	687, 688	— — §§ 2, 3	706
— c. 381, § 3	704, 705	— c. 124	651
— c. 390	389	— c. 169	749
— — § 6	390	— c. 201, § 3	651
— c. 429	411	— c. 209, § 3	685
— c. 457	720	— c. 288	745
— — § 1	560	— — § 1	744, 746
— — §§ 9, 10	527	— c. 295, § 8	673
— c. 481	403	— — §§ 9, 10	672, 673
— c. 493	517, 687	— c. 339, §§ 2, 3	719

RESOLVES.

	PAGE		PAGE
1906, c. 11	483, 484	1922, c. 50	248
1911, c. 101	129	1924, c. 20	540
1915, c. 134	42		

COLONIAL ORDINANCE.

	PAGE
1641–1647	262

PROVINCE LAWS.

	PAGE		PAGE
1693-94, c. 3, § 12	44	1779-80, c. 18	635

REVISED STATUTES.

	PAGE		PAGE
c. 7, § 5	573	c. 119, § 12	265
c. 60, § 26	539		

PUBLIC STATUTES.

	PAGE		PAGE
c. 11, § 5, cl. 3rd	177	c. 90, § 14	460
— §§ 14-16, 4	42	c. 104, § 14	493
c. 19, § 3	750	c. 113, § 32	28, 29, 32
c. 27, § 21	237	— § 33	33
c. 41, § 9	495	c. 116, § 20, cl. 3rd	367

REVISED LAWS.

	PAGE		PAGE
c. 12, § 5	178, 577, 579	c. 96, § 3	464, 465, 750
— §§ 16-18, 4	42	— §§ 15, 18	316
c. 19	230	c. 103, § 9	397
— § 7	228, 229	c. 104, §§ 27, 28	493
c. 25, § 26	236	c. 112, § 44	29
c. 35, § 5	8	c. 113, § 26	267
c. 39, § 9	495	c. 116, § 2, 5	314
c. 42, §§ 1, 2, 4, 8	347	c. 125	575
c. 65, § 15	418	c. 204, §§ 42, 44	400
c. 90, § 31	460		

GENERAL LAWS.

	PAGE		PAGE
c. 1, § 7	234	c. 12, §§ 1-11	45
c. 3, §§ 9, 20	702	— § 3	571, 726
c. 4, § 6	585, 588	— § 9	377
— § 7	236, 478, 684	— §§ 23, 24	393
— § 9	723	c. 13, § 6	437
c. 5, § 1	687, 688	— §§ 16-18	668
— § 2	456	— § 25	394, 397
— § 10	517	c. 15, § 5	495
— § 12	518	c. 16, §§ 1, 2	273
c. 6, § 4	700, 701, 702	— § 3	274
— § 21	529, 530, 724	— § 4	272, 274
c. 7	687, 688	c. 28	509
c. 8, §§ 4, 9, 12	297	c. 29, § 31	330
c. 9, § 11	324	c. 30, § 5	278
c. 10, § 5	529, 530	— §§ 8, 10	704
c. 11, § 2	529	— § 21	330, 439, 448
— § 3	530	c. 31	509

GENERAL LAWS — *Con.*

	PAGE		PAGE
c. 31, § 3	37, 75	c. 53, § 68	376
— § 18	38	c. 54	583
— §§ 19, 21–28	570	— §§ 115, 116, 118	625
— § 20	228, 229	— § 135	7
— § 21	194, 199, 557	— § 158	519, 520
— § 26	90, 91	c. 55, § 16	530, 592
— § 43	698, 699	— § 17	531
— § 44	695, 596, 698, 699	c. 58, § 1	176, 571
— § 45	698	— §§ 9, 10	684
c. 32, §§ 1–5	76	— § 27	525, 526
— § 1	437, 693	c. 59	92
— § 2	75, 308, 309, 440, 442	— § 3	306
— § 4	438, 439, 440	— § 5	177, 178, 573, 574, 580
— § 5	308, 437, 438, 439, 440, 693	— §§ 11, 15	304
— §§ 6–19	220, 554, 555, 630	— §§ 12–14	42, 303
— § 7	224, 257, 258, 555	— § 29	573
— § 8	257	— § 57	721, 723
— § 9	630	c. 60, §§ 79–81	644
— § 10	222, 223, 224, 630, 631	c. 61	406
— §§ 49–60	646, 647	c. 62	40, 41, 741
— § 57	647	— § 5	496
— §§ 75, 76	521, 523	— §§ 43, 45	526
— § 91	631	c. 63, § 30	86, 87, 299, 304
c. 35, §§ 16, 29	656	— §§ 30–52	303, 547
— § 34	657	— § 32	655
c. 39, §§ 11, 12, 14	588	— § 39	655
c. 40, § 1	236, 237	— § 41	217
— § 15	65	— § 42	218, 219
— § 22	235, 675	— § 51	724
— § 32	235, 237	— § 52	732, 734, 735
c. 41, § 2	417	— §§ 53–60	3, 733, 735
— §§ 16, 20, 29	586	— § 58	1, 3, 4, 5
— §§ 73–79, 80, 81	638, 639	— § 60	734
— § 107	586	— §§ 61–66	32
— § 109	127	— § 71	724, 725, 727
c. 44, § 7	598	c. 65, § 1	98, 99, 100, 387
— § 8	597, 598	— § 2	498
c. 45, § 14	64	c. 66, § 3	8, 9, 606
c. 46	325	— § 10	8, 324, 606
— § 1	728	c. 67, §§ 12, 22, 23, 29, 42	588
— §§ 17, 21	324	— § 15	586
c. 48, § 62	588	c. 69, § 9	554, 555, 556
c. 49, §§ 35, 36	586	c. 70	500, 502, 503, 504
c. 52	350	— § 1	593, 594, 700
c. 53	747	— § 2	504
— § 1	520	— § 17, pt. II	463
— §§ 18–22	113, 446, 583, 584	c. 71, §§ 1–5	347
— §§ 19–22	113	— § 4	503
— § 24	520, 521	— §§ 61, 63, 64	683
— § 34	350	— § 65	685

GENERAL LAWS — *Con.*

	PAGE		PAGE
c. 71, § 68	463	c. 101, § 17	418, 419
c. 73	495	— § 22	165, 312, 419
c. 74, § 14	347, 349	— § 27	588
c. 76, § 15	370, 374, 375	— § 31	311, 312
c. 79	24	— § 32	417
— § 8	58	c. 103, § 14	166
— §§ 6, 12, 14, 45	21	— §§ 3, 6-11, 13	389
— §§ 8, 12, 16	59	c. 105, §§ 1, 3	166
c. 81, §§ 4, 5, 24	404	— §§ 1, 6	659, 660
— § 9	745, 746	c. 106, § 3	565
— § 13	405	c. 107, § 176	589
— § 18	283, 405	c. 109, § 5	586
— § 23	745	c. 111	732
c. 82, § 37	638, 639	— §§ 78-90, 91	411
c. 84, § 1	405	— §§ 96, 99, 100, 131	587
— § 12	588	— § 112	470
c. 85, § 23	298	— §§ 181, 183	370, 375
— § 30	599, 600, 602	— § 182	371
c. 90	274, 275, 295	c. 112	165
— § 18	235	— § 33	10
— § 22	662	— §§ 35, 37, 38	462
— § 24	513, 515, 516, 653, 682	— §§ 66-73	668
— § 29	273, 275	— § 67	667
— § 34	95, 744	— § 68	665, 667
c. 91, § 2	558, 673, 674, 750	— §§ 69, 70	666
— §§ 13, 19	316	c. 115, § 6	226
— § 20	660	— §§ 10	226, 227
— § 35	268	— § 17	225, 226, 227
c. 92, § 33	259	c. 116, § 1	343
— § 35	260	c. 117, §§ 14, 17	470
— § 37	261	c. 119, § 65	85
c. 93, §§ 1, 2	142	c. 120, §§ 12, 21	737, 738
— §§ 19-23	52	c. 122, § 1	90
— §§ 24, 25	166	c. 123, § 45	209
c. 94, § 8	702	— § 46	210
— § 9	702, 703	— § 47	207, 208
— § 39	164	— § 51	626
— § 40	166	— § 53	627
— § 56	182	— § 54	628
— § 66	190	— § 66	210
— § 104	212, 213	— § 73	750
— §§ 110, 114	537, 538	— §§ 77, 88	603, 604
— §§ 197-217	33	c. 127	606
— § 214	587	— § 7	606
— § 304	397	— §§ 16, 17	605
c. 100, § 2	165	— §§ 131, 132	199
c. 101	462	— §§ 131, 133	193, 287, 505
— § 3	165	— § 136	193
— § 13	311, 312	c. 128, § 14	182
— §§ 14, 18	311	— § 24	358, 359, 360

GENERAL LAWS — *Con.*

	PAGE		PAGE
c. 128, § 28	358, 360	c. 158, § 36	588
c. 129, § 2	457	c. 159, § 91	586
— § 7	457	c. 160, § 190	618
— § 8	458, 459, 460	c. 161, § 89	29
— § 11	457	— § 108	346, 347, 348, 349
— § 15	416	c. 164, § 116	587
— § 27	407	c. 168, § 47	344, 346
— § 32	459	— § 50	345, 346
— § 33	459, 460	— § 54	201, 202, 363, 364, 366, 367, 368, 369, 685, 687
c. 130, §§ 24, 32, 33	267, 268	c. 169, §§ 2, 3	166
— §§ 32, 36, 37, 59	608	c. 171, § 5	160
c. 131, §§ 3-14	409, 410	— §§ 11, 13, 20, 23	161
— § 16	60	c. 172, § 3	314, 315
c. 136, § 17	211	— § 7	2
c. 138, § 32	588	— § 18	2, 314, 315
— § 76	361, 362, 751	— § 25	629
— § 82	362	— § 61	200
c. 140, §§ 2, 42, 59, 70	165	c. 175	474, 648, 668
— § 90	606, 607	— § 2	535, 536, 537, 552, 568, 716
— §§ 96-114	607	— § 3	414, 535
— § 96	160, 165	— §§ 9-12	680
— § 130	162	— § 14	650, 651
c. 142, § 3	238, 239	— § 18	71
— §§ 4, 14	398	— § 20	561
c. 143, § 11	589	— § 32	537
— §§ 62-71	494	— § 47	356, 357, 430, 535, 536, 537
c. 146, § 34-41	231	— § 49	535
c. 147, § 5	294	— § 51	357
c. 148, § 14	294	— § 52	430
— § 30-51	453	— §§ 63, 66	431
— § 30	294, 450	— § 99	670
— § 31	453, 454	— § 105	72, 477, 479
— § 45	293, 451	— § 107	476, 477, 479
c. 149, §§ 1, 17	146	— § 108	415
— § 30	148	— § 110	413, 414
— § 36	149	— § 118	716, 717, 718
— § 56	145, 148, 681, 682	— § 119	716
— §§ 1, 60-83, 85, 86	422, 423, 425	— § 132	436, 481, 484, 485, 486, 487, 690, 691
c. 150, § 5	162, 163	— § 133	414
c. 152, § 56	71, 72	— § 140	481, 482, 483, 484, 485, 486, 487
— § 69	309	— § 142	436
— § 73	310	— § 152	670, 716
c. 155, § 6	477	— § 153	679, 718
— § 9	752	— § 157	477, 479, 670
— § 10	751, 752	— §§ 162-166	476
— § 15	588	— § 163	165, 477
— § 22	79, 80		
c. 156, §§ 41, 44	315		
c. 158, § 17	586, 589		
— § 31	586		

GENERAL LAWS — *Con.*

	PAGE		PAGE
c. 175, § 166 . . .	176, 254, 255, 256, 556, 649	c. 219, § 1	586
— § 167	556, 649	c. 220, § 3	587
— § 173	649, 650	— § 13	85
— § 174	214, 215, 490, 650	c. 221, § 41	738
— §§ 182-184	431, 488, 489	c. 222, § 1	581, 585, 588, 591
— § 193	489	c. 225, § 1	248
— § 194	489	c. 233, §§ 1, 5, 6, 26, 45, 46	587
c. 176	243	— § 41	591
— § 1	587	— § 77	589
— §§ 13, 14	240, 241, 242	c. 236, § 34	587
— §§ 16, 17, 19	242, 588	c. 244, § 2	586
c. 179, § 1	588	c. 248, § 2	586, 587
c. 180	643	c. 252	181, 720
— § 2	361	— §§ 1, 5	560
— §§ 20-25	284, 285	c. 262, §§ 8, 29, 59	750
c. 183, § 3	539	— § 21	531, 532
— § 30	586, 589, 591	— §§ 25, 29	702
c. 201, § 2	588, 589	— § 50	399, 400, 532
c. 207, §§ 19, 20-21	728	— §§ 52, 53	400
— §§ 28, 32, 33, 35, 50	729	— § 56	326, 330, 399
— §§ 38, 39	150, 588	— § 57	399
— § 45	730	c. 266, § 56	327
c. 218, § 8	704	— § 89	52, 54, 56, 57, 157
— § 35	586	c. 269, §§ 1, 3	588
— § 36	587	c. 276, § 83	522
— § 37	587	c. 277, § 57	121
— § 47	531, 532	c. 279, § 18	192
— § 74	707	— § 24	286, 505

TABLE OF CASES CITED IN THIS VOLUME.

	PAGE		PAGE
Adair <i>v.</i> United States, 208 U. S.	333	Attorney-General <i>v.</i> City of Cam-	
Adams <i>v.</i> Russell, 229 U. S.	353	bridge, 119 Mass.	518 . . . 661
— <i>v.</i> Tanner, 244 U. S.	590 . . . 166	— <i>v.</i> Drohan, 169 Mass.	534 . . . 351, 707
Adkins <i>v.</i> Children's Hospital, 261 U. S.		— <i>v.</i> Ellis, 198 Mass.	91 . . . 265, 281
525	333	— <i>v.</i> Herrick, 190 Mass.	307 . . . 263
Aetna Life Ins. Co. <i>v.</i> Hardison, 199		— <i>v.</i> Loomis, 225 Mass.	372 . . . 704
Mass. 181	485	— <i>v.</i> Mass. Pipe Line Gas Co., 179	
Agawam <i>v.</i> Hampden, 130 Mass.	528	Mass. 15	4
Akers <i>v.</i> United New Jersey R. R., 43		— <i>v.</i> Old Colony R. R. Co., 160	
N. J. L. 110	359	Mass. 62	13
Alderman <i>v.</i> Phelps, 15 Mass.	225 . . . 722	— <i>v.</i> Pelletier, 240 Mass.	264 45, 352, 361
Alexander <i>v.</i> Big Rapids, 76 Mich.	282	— <i>v.</i> Revere Copper Co., 152 Mass.	
— <i>v.</i> Gordon, 101 Fed. 91	644	444	263
Allen <i>v.</i> Boston, 159 Mass.	324 . . . 677	— <i>v.</i> Tillinghast, 203 Mass.	539 . . . 707
— <i>v.</i> Mass. Bonding & Insurance		— <i>v.</i> Tufts, 239 Mass.	458, 537 45, 515
Co., 248 Mass.	378 . . . 510	— <i>v.</i> Vineyard Grove Co., 181 Mass.	
Allgeyer <i>v.</i> Louisiana, 165 U. S.	578 . . . 670	507	265
Alpha Portland Cement Co. <i>v.</i> Com-		— <i>v.</i> Wallace, 7 B. Mon. (Ky.)	611 151
monwealth, 244 Mass.	530 . . . 550	Averell <i>v.</i> Newburyport, 241 Mass.	333 700
American Pig Iron Storage Co. <i>v.</i> State		Ayers <i>v.</i> Hatch, 175 Mass.	489 . . . 91
Board of Assessors, 56 N. J. L.	389	Babcock <i>v.</i> Mores Home for Infirm	
American Unitarian Assn. <i>v.</i> Minot,		Hebrews, 225 Mass.	418 . . . 180
185 Mass.	589 . . . 510	Bacon <i>v.</i> Sandberg, 179 Mass.	396 . . . 512
Amherst College <i>v.</i> Assessors of Am-		Baker <i>v.</i> Commercial Union Assurance	
herst, 173 Mass.	232 . . . 574	Co., 162 Mass.	358 . . . 492
— <i>v.</i> Assessors of Amherst, 193 Mass.		Baltimore <i>v.</i> Baltimore Trust Co., 166	
168	574	U. S. 673	336
Appleyard <i>v.</i> Massachusetts, 203 U. S.		— <i>v.</i> Hook, 62 Md.	371 . . . 639
222	105, 611	Bancroft <i>v.</i> Cambridge, 126 Mass.	438 64
Arkadelphia Co. <i>v.</i> St. Louis S. W. Ry.		— <i>v.</i> Lynnfield, 18 Pick.	566 . . . 70
Co., 249 U. S.	134 . . . 538	Bannister <i>v.</i> Soldiers' Bonus Board,	
Armstrong <i>v.</i> Village of Fort Eduard,		43 R. I.	346 . . . 256
159 N. Y.	315 . . . 674	Barron <i>v.</i> Boston, 187 Mass.	168 462, 701
Arnold <i>v.</i> North American Chemical		Barrus <i>v.</i> Phaneuf, 166 Mass.	123 . . . 328
Co., 232 Mass.	196 . . . 565	Bartlett, petr., 163 Mass.	509 . . . 575
Astell <i>v.</i> Kansas, 209 U. S.	251 . . . 408	Bassing <i>v.</i> Cady, 208 U. S.	386 . . . 105, 611
Ashley <i>v.</i> Three Justices of Superior		Bates <i>v.</i> Selectmen of Westfield, 222	
Court, 228 Mass.	63 . . . 289, 737	Mass. 296	91
Atlee <i>v.</i> Packet Co., 21 Wall.	839 . . . 393,	Baxter <i>v.</i> Buchholz-Hill Co., 227 U. S.	
396, 397		637	727
Attorney-General <i>v.</i> Abbott, 154 Mass.		Beals <i>v.</i> Brookline, 245 Mass.	20 . . . 640
323	265		

	PAGE		PAGE
Bellows Falls Power Co. v. Commonwealth, 222 Mass. 51	302	Bradley v. Frazer, 54 Ia. 289	343
Belmont v. Smith, 8 N. Y. Super. Ct. (1 Duer), 675, 678	715	Branahan v. Hotel Co., 39 Ohio St. 333	677
Bemis v. Wilder, 100 Mass. 446	466	Brayton v. Fall River, 113 Mass. 218	677
Bent v. Emery, 173 Mass. 495	21	Brazee v. Michigan, 241 U. S. 340	166
Berea College v. Kentucky, 211 U. S. 45	353	Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71	5
Betts v. Clifford, Warwick Lent Assizes, 1858 (Eng.)	327	— v. Rochester, 16 Gray, 337	701
Bickford v. Brooksville (1867), 55 Me. 89	196, 255	Brimmer v. Boston, 102 Mass. 19	21
Biddinger v. Commissioner of Police, 245 U. S. 128	611	Brockton v. Uxbridge, 138 Mass. 292	342
Bingham v. Commissioner of Corporations and Taxation, 249 Mass. 79	497	Bronson v. Shulten, 104 U. S. 410	727
Binns v. United States, 194 U. S. 486	365	Brooks v. West Springfield, 193 Mass. 190	41
Bitterman v. Louisville & Nashville R. R. Co., 207 U. S. 205	618	Brown v. Commonwealth, 100 Ky. 127	652
Blake v. Sanderson, 1 Gray, 332	466	— v. Lowell, 8 Met. 172	745
Blumenstock Brothers Advertising Agency v. Curtis Publishing Co., 252 U. S. 436	159	— v. Lynch, 2 Bradf. (N. Y.) 214	467
Bogigian v. Commissioner of Corporations and Taxation, 248 Mass. 545	725	— v. Russell, 166 Mass. 14	45, 707
Bogni v. Perotti, 224 Mass. 152	333	Browne v. Turner, 174 Mass. 150	584
Boston v. Boston Elevated Ry. Co., 213 Mass. 407	252	Brushaber v. Union Pacific R. R. Co., 240 U. S. 1	95
— v. Chelsea, 212 Mass. 127	123	Buchanan v. Warley, 245 U. S. 60	334
— v. Jackson, 260 U. S. 309	366	Buchman v. State, 59 Ind. 1	327
— v. Schaffer, 9 Pick. 415	136	Buckeye Pipe Line Co. v. Fee, 62 Ohio St. 543	727
— v. Sears, 22 Pick. 122	417	Burdett v. Walsh, 235 Mass. 153	568
— v. Talbot, 206 Mass. 82	67	Burdick v. People, 149 Ill. 600	619
— v. Treasurer and Receiver General, 237 Mass. 403	12, 331, 366, 571, 642	Burgess v. Mayor and Aldermen of Brockton, 235 Mass. 95	136
Boston & Albany R. R. Co. v. Public Service Commissioners, 232 Mass. 358	745	Burke v. Board of Health, 219 Mass. 219	239
Boston Beer Co. v. Massachusetts, 97 U. S. 25	14	Burnett v. Freeman, 125 Mo. App. 683	328
Boston Chamber of Commerce v. Boston, 195 Mass. 338	640	Burr v. The First Parish in Sandwich, 9 Mass. 277	152
Boston Fish Market Corp. v. Boston, 224 Mass. 31	465	Burrage v. County of Bristol, 210 Mass. 299	601
Boston Glass Manufactory Co. v. Langdon, 24 Pick. 49	5	Butchers Slaughtering, etc., Assn. v. Boston, 214 Mass. 254	78
Boston, petitioner, 221 Mass. 468	412	Butler v. Attorney-General, 195 Mass. 79	264
Boston Railroad Holding Co. v. Commonwealth, 215 Mass. 493	41	— v. Martin, 220 Mass. 224	80
Boston Water Power Co. v. Boston & Worcester R. R. Corp., 23 Pick. 360	13	C. A. Weed & Co. v. Lockwood, 266 Fed. 785	141
Bowen v. Dean, 110 Mass. 438	99	— v. Lockwood, 264 Fed. Rep. 453	249
		Callanan v. Hurley, 93 U. S. 387	645
		Cambridge v. County Commissioners, 114 Mass. 337	180, 574
		Cambridge Savings Bank v. Clerk of Courts, 243 Mass. 424	706
		Canton Institution for Savings v. Murphy, 156 Mass. 305	568
		Capen v. Foster, 12 Pick. 485, 488	635
		Carey-Lombard Lumber Co. v. Bierbauer, 76 Minn. 434	715

	PAGE
Carnig v. Carr, 167 Mass. 544 . . .	708
Carr v. Riley, 198 Mass. 70 . . .	511
Cary Library v. Bliss, 151 Mass. 364 13, 65	
Case of Seven Bishops, 3 Mod. 212 . . .	633
Cathaway v. Bowles, 136 Mass. 54 . . .	102
Central Bridge Corp. v. Lowell, 4 Gray, 474 . . .	13
Central Shade Roller Co. v. Cushman, 143 Mass. 353 . . .	142
Chaffers v. Goldsmid, 1894, 1 Q.B. 186 634	
Chapel of the Good Shepherd v. Boston, 120 Mass. 212 . . .	179
Chapin v. Lowell, 194 Mass. 486 373, 600	
Charlesbank Homes v. Boston, 218 Mass. 14 . . .	179
Charleston v. Allen, 6 Vt. 633 . . .	152
Chase v. Chase, 191 Mass. 166 . . .	729
Chase v. Sutton Mfg. Co., 4 Cush. 152 64	
Cheshire v. County Commissioners, 118 Mass. 386 . . .	545
Chicago Life Ins. Co. v. Needles, 113 U. S. 574 . . .	18
Chicago Mutual Life Ind. Assn. v. Hunt, 127 Ill. 257 . . .	242
Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189 . . .	80
Civil Rights Cases, 109 U. S. 3 . . .	353
Clafin v. United States Credit System Co., 165 Mass. 501 . . .	536
Clark v. Gill, 1 Kay & J. 19 (Eng.) . . .	327
Cleveland v. Norton, 6 Cush. 380 . . .	267
Clemens Electrical Mfg. Co. v. Walton, 168 Mass. 304 . . .	288
Cleveland, etc., Ry. Co. v. People, 212 Ill. 638 . . .	706
Codman v. Crocker, 203 Mass. 146 . . .	416
Coe v. Errol, 116 U. S. 517 . . .	538
Coffey v. Gamble, 117 Iowa, 545 . . .	727
Cole v. Tucker, 164 Mass. 486 . . .	352, 622
Commercial Fire Ins. Co. v. Board of Revenue, Montgomery Co., 99 Ala. 1 2	
Commissioner of the Public Works v. Justice, Dorchester District, 228 Mass. 12 . . .	725
Commissioners of Washington Park, 56 N. Y. 144 . . .	640
Commonwealth v. Adams, 114 Mass. 323 . . .	106
— v. Alger, 7 Cush. 53 . . .	14, 51, 110, 165, 266, 637
— v. Anselvich, 186 Mass. 376 . . .	61
— v. Atlas, 244 Mass. 78 . . .	452, 514

	PAGE
Commonwealth v. Boston Advertising Co., 188 Mass. 348 . . .	640
— v. Boston & Maine R. R., 222 Mass. 206 . . .	333
— v. Boston & Northern St. Ry. Co., 212 Mass. 82 . . .	31
— v. Brooks, 109 Mass. 355 . . .	298
— v. Brown, 167 Mass. 144 . . .	192, 286
— v. Carpenter, 100 Mass. 204 . . .	61
— v. Carter, 132 Mass. 12 . . .	396
— v. Clary, 8 Mass. 72 . . .	234
— v. Connecticut Valley St. Ry. Co., 196 Mass. 309 . . .	346
— v. Coupe, 128 Mass. 63 . . .	266
— v. Daley, 4 Gray, 209 . . .	652
— v. Danziger, 176 Mass. 290 . . .	165
— v. Davis, 140 Mass. 485 . . .	237
— v. Dee, 222 Mass. 184 . . .	252
— v. Follett, 164 Mass. 477 . . .	608
— v. Gage, 114 Mass. 328 . . .	676
— v. Gorham, 99 Mass. 420 . . .	361
— v. Hamilton Mfg. Co., 12 Allen, 298 . . .	300
— v. Hamilton Mfg. Co., 120 Mass. 383 . . .	147
— v. Hana, 195 Mass. 262 . . .	166, 171, 312, 334, 596
— v. Harris, 231 Mass. 584 . . .	83
— v. Hawkins, 157 Mass. 551 . . .	106
— v. Interstate, etc., St. Ry. Co., 187 Mass. 436 . . .	31, 334, 352
— v. Jacobson, 183 Mass. 242 . . .	372
— v. Keary, 198 Pa. 500 . . .	619
— v. Kiley, 150 Mass. 325 . . .	361
— v. Kozlowsky, 238 Mass. 379 . . .	49
— v. Lahy, 8 Gray, 459 . . .	61
— v. Libbey, 216 Mass. 356 . . .	352, 737
— v. Lockwood, 109 Mass. 323 . . .	361
— v. McCarthy, 225 Mass. 192 452, 514	
— v. McDermott, 224 Penn. 363 . . .	652
— v. McGann, 213 Mass. 213 . . .	453
— v. McMonagle, 1 Mass. 517 . . .	462
— v. Maletsky, 203 Mass. 241 452, 514	
— v. Maloney, 145 Mass. 205 . . .	515
— v. Marshall, 11 Pick. 350 . . .	321
— v. Mathews, 122 Mass. 60 . . .	676
— v. Moore, 214 Mass. 19 . . .	395
— v. Morrison, 197 Mass. 199 . . .	676
— v. Mott, 21 Pick. 492 . . .	652
— v. Muthall, 162 Mass. 496 . . .	298
— v. New England College of Chiropractic, 221 Mass. 190 . . .	57, 158

	PAGE		PAGE
Commonwealth v. New England Slate & Tile Co., 13 Allen, 391 . . .	303	Cotting v. Kansas City Stock Yards Co., 183 U. S. 79 . . .	335
— v. N. Y. C. & H. R. R. Co., 206 Mass. 417 . . .	374, 600	County Com. v. Lee, 3 Colo. App. 177	328
— v. Newhall, 205 Mass. 344 . . .	298	Cowell v. Thayer, 5 Met. 253 . . .	282
— v. Nickerson, 236 Mass. 281	373, 600	Crane v. New York, 239 U. S. 195 . . .	334
— v. North Shore Ice Delivery Co., 220 Mass. 55 . . .	143	Crocker v. Justices of the Superior Court, 208 Mass. 162 . . .	121
— v. Ober, 12 Cush. 493 . . .	312	Cross v. Bouck, 175 Cal. 253 . . .	465
— v. Packard, 185 Mass. 64 . . .	294	Crusoe v. Bugby, 3 Wills. 234 . . .	465
— v. Page, 155 Mass. 227 . . .	676	Curry v. Spencer, 61 N. H. 624 . . .	136
— v. Parker, 2 Pick. 550 . . .	119, 322	Curtis v. New York Life Ins. Co., 217 Mass. 47 . . .	486, 716
— v. People's Five Cents Savings Bank, 5 Allen, 428 . . .	133	Dallemagne v. Moisan, 197 U. S. 169	508
— v. Peters, 2 Mass. 125 . . .	14	Daniel v. Hill, 52 Ala. 430 . . .	468
— v. Plaisted, 148 Mass. 375 . . .	622	Davis v. Caldwell, 12 Cush. 512, 513 . . .	249
— v. Porn, 196 Mass. 326 . . .	166	— v. Colburn, 128 Mass. 377 . . .	102
— v. Porter, 1 Gray, 476 . . .	111, 635	— v. Rockport, 213 Mass. 279 . . .	65
— v. Reid, 175 Mass. 202 . . .	312, 652	Dearborn v. Ames, 8 Gray, 1 . . .	49, 189
— v. Riley, 210 Mass. 387 . . .	147, 682	Dedham v. Natick, 16 Mass. 135 . . .	467
— v. Rogers, 181 Mass. 184 . . .	352, 622	Deerfield v. Connecticut River R. R., 144 Mass. 325 . . .	265
— v. Roswell, 173 Mass. 119 . . .	165	Delaney v. Grand Lodge A. O. U. W., 244 Mass. 556 . . .	243
— v. Roxbury, 9 Gray, 451 . . .	263	Delaware, L. & W. R. Co. v. Petrowsky, 250 Fed. 554 . . .	469
— v. Slocum, 230 Mass. 180 . . .	136, 453	Den v. Post, 25 N. J. L. 285 . . .	465
— v. Smith, 141 Mass. 135 . . .	183, 396	Denver & R. G. R. Co. v. Denver, 250 U. S. 241 . . .	336
— v. Stevens, 155 Mass. 291 . . .	35	Derinza's Case, 229 Mass. 435 . . .	524
— v. Stodder, 2 Cush. 562 . . .	676	Devoe v. Commonwealth, 3 Met. 316 . . .	359
— v. Strauss, 191 Mass. 545	143, 165, 352	Dewey v. Richardson, 206 Mass. 430	136, 165
— v. Tiffany, 119 Mass. 300 . . .	263	Dickey v. Trustees of Putnam Free School, 197 Mass. 468 . . .	502
— v. Titcomb, 229 Mass. 14 . . .	137, 141, 166, 334, 352	Dills v. State, 59 Ind. 15 . . .	327
— v. Tufts, 239 Mass. 458, 537 . . .	517	Dinan v. Swig, 223 Mass. 516 . . .	123
— v. Wetherbee, 105 Mass. 149 . . .	568	Dingley v. Boston, 100 Mass. 544 . . .	64
— v. Wheeler, 205 Mass. 384 . . .	395	Dixon v. People, 168 Ill. 179 . . .	328
— v. Williams, 6 Gray, 1 . . .	61	— v. The State, 12 Ga. App. 17 . . .	328
— v. Wilson, 14 Phila. 384 . . .	619	Dobbins v. Los Angeles, 195 U. S. 223	14
Conant v. Burnham, 133 Mass. 503 . . .	249	Donovan v. Board of Labor and Industries, 225 Mass. 410 . . .	704
Connors v. Lowell, 246 Mass. 279 . . .	514	— v. Haverhill, 247 Mass. 69 . . .	304
Connolly v. Union Sewer Pipe Co., 184 U. S. 540 . . .	137, 140, 334	— v. Pennsylvania Co., 199 U. S. 279	677
Cooley v. Cook, 125 Mass. 406 . . .	722	Dorsey v. Brigham, 177 Ill. 250 . . .	701
— v. O'Connor, 12 Wall. 391 . . .	416	Douglas v. Noble, 261 U. S. 165 . . .	443
Coolidge v. Learned, 8 Pick. 504 . . .	265	Downey v. Bay State St. Ry., 225 Mass. 281 . . .	715
Copeland v. Mayor and Aldermen of Springfield, 166 Mass. 498 . . .	745	Drew v. Thaw, 235 U. S. 432 . . .	611
Coppage v. Kansas, 236 U. S. 1 . . .	333	Drury v. Inhabitants of Natick, 10 Allen, 169 . . .	575
Corey v. Wrentham, 164 Mass. 18 . . .	640	Duddy's Case, 219 Mass. 548 . . .	105
Cornish's Trial, 11 How. St. Tr. 460 (1685) . . .	82		
Cotting v. Commonwealth, 205 Mass. 523 . . .	465, 674, 751		

	PAGE		PAGE
Duffy & Cooke, 239 Pa. St.	427	Foley v. Hill, 2 H. L. Cas.	28
Duffy v. Treasurer and Receiver General, 234 Mass.	42	Forster v. Scott, 136 N. Y.	577
Duggan v. Bay State Street Ry. Co., 230 Mass.	370	Foss v. Wexler, 242 Mass.	277
Dunn v. Lowe, 203 Mass.	516	Foster v. Park Commissioners, 133 Mass.	321
Dunwoody v. United States, 22 Ct. Claims, 269		— v. White, 86 Ala.	467
Durfee v. Old Colony, etc., R. R. Co., 5 Allen,	230	Fort Leavenworth R. R. Co. v. Lowe, 114 U. S.	525
Durgin v. Minot, 203 Mass.	26	Freetown v. Taunton, 16 Mass.	52
Eastern R. R. Co. v. Boston & Maine R. R., 111 Mass.	125	French v. Conn. River Lumber Co., 145 Mass.	261
Eaton, Crane & Pike Co. v. Commonwealth, 237 Mass.	523	French v. Sangerville, 55 Me.	69
Edwards v. Bruorton, 184 Mass.	529	Friend v. Gilbert, 108 Mass.	408
Electric Welding Co. v. Prince, 195 Mass.	242	Fry v. State, 63 Ind.	552
Elliott v. Stone, 1 Gray,	571	Fuller v. Mayor of Medford, 224 Mass.	176
Ellis v. Anderson, 49 Pa. Sup. Ct.	245	Gage v. Steinkrauss, 131 Mass.	222
Ellsworth v. Dorwart, 95 Ia.	108	Gagnon v. United States, 193 U. S.	451
Emerson v. Trustees of Milton Academy, 185 Mass.	414	Gardner Water Co. v. Gardner, 185 Mass.	190
Emery v. Emery, 218 Mass.	227	Garrison v. New York, 21 Wall.	196
Emmons v. Shaw, 171 Mass.	410	General Baking Co. v. Street Commissioners, 242 Mass.	194
Engel v. O'Malley, 219 U. S.	128	Gero v. Metropolitan Park Commission, 232 Mass.	389
Equitable Life Assurance Society v. Clements, 140 U. S.	226	Gibbs v. Estey, 15 Gray,	587
<i>Ex parte</i> Bartlett, 4 Bradf. (N. Y.)	221	Gilbert John Bannister v. Soldiers' Bonus Board, 43 R. I.	346
— Dement, 53 Ala.	389	Glass v. State Board of Public Roads, 44 R. I.	54
— Hughes, 50 Tex. Cr. R.	614	Gleason v. McKay, 134 Mass.	419
— Reggel, 114 U. S.	642		134, 550
— Siebold, 100 U. S.	371	Goldstein v. Conner, 212 Mass.	57
— Spencer, 228 U. S.	652	Gordon v. Chief of Police of Cambridge, 244 Mass.	491
Farr Alpaca Co. v. Commonwealth, 212 Mass.	156	Goulis v. Judge of District Court, 246 Mass.	1
Fay v. Salem & Danvers Aqueduct Co., 111 Mass.	27	Graham v. Roberts, 200 Mass.	152
Field v. Mills, 33 N. J. L.	254		123, 622
Finley v. Mexican Inv. Corp., 1897, 1 Q.B.	517	— v. West Virginia, 224 U. S.	616
Firemens Ins. Co. v. Commonwealth, 137 Mass.	80	Great Barrington v. Gibbons, 199 Mass.	527
First Parish in Sudbury v. Jones, 8 Cush.	184		374, 600
First Universalist Society in Salem v. Bradford, 185 Mass.	310	Greenfield Savings Bank v. Commonwealth, 211 Mass.	207
Fitzgerald v. Arel, 63 Ia.	104	Greenway v. Adams, 12 Ves. Jr.	395
— v. Lewis, 164 Mass.	495	Gregg v. Jamison (1867), 55 Pa.	468
Flinn v. Prairie County, 60 Ark.	204	Greves v. Shaw, 173 Mass.	205
Flynn v. Allen (1865), 26 Phila. Leg. Int. 37		Griggs v. Moors, 168 Mass.	354
		Grimmett v. State, 22 Tex. App.	36
		Hale v. Everett, 53 N. H.	9
		Hall v. Geiger Jones Co., 242 U. S.	539
			165, 334

	PAGE		PAGE
Hamilton v. Lane, 138 Mass.	358	International Harvester Co. v. Mis-	
Hammond v. Hyde Park, 195 Mass.	29	souri, 234 U. S.	199
	373, 600	International Textbook Co. v. Gilles-	
Hargrave v. King, 40 N. C.	430	pie, 229 Mo.	397
Hartford Fire Ins. Co. v. Becton &		— v. Lynch, 81 Vt.	101
Terrell, 103 Tex.	236; 125 S. W.	— v. Pigg, 217 U. S.	91
883	325	55, 158, 159	
Harvard College v. Cambridge, 175		— v. Peterson, 133 Wis.	302
Mass.	145	— v. Connelly, 124 N. Y. Supp.	603
	574	159	
— v. Gore, 5 Pick.	370	— v. Connolly, 206 N. Y.	188
	701	249	
Hawke v. Smith, No. 1, 253 U. S.	221	Jackson v. Harrison, 17 Johns (N. Y.)	
	446	66	465
— No. 2, 253 U. S.	231	— v. Phillips, 14 Allen,	539
	446	574	
Hayden v. Stone, 112 Mass.	346	— v. Silvernail, 15 Johns (N. Y.)	278
	266	465	
Heim v. McCall, 239 U. S.	175	Jacobson v. Massachusetts, 197 U. S.	
	334	11	372
Hendrick v. Maryland, 235 U. S.	610	James Sullivan v. Wilhelm Kanuth, 220	
136		N. Y.	216
Henry v. Babcock & Wilcox Co., 196			319
N. Y.	302	Jaquith v. Wellesley, 171 Mass.	138
	80		352
Higginson v. Treasurer & School House		Jenkins v. Andover, 103 Mass.	94
Commissioners of Boston, 212 Mass.			500
583	64	Jennings v. Davis, 31 Conn.	134
Hill v. Treasurer and Receiver General,			41
229 Mass.	474	Johnson v. Copeland, 35 Ala.	521
	498		467
Hittinger v. Eames, 121 Mass.	539	— v. Langdon, 135 Cal.	624
	264		80
— v. Westford, 135 Mass.	258	Jones v. Robbins, 8 Gray,	329
	462		83
Hodgdon v. Haverhill, 193 Mass.	406	Jordan Marsh Co. v. Cohen, 242 Mass.	
	6	245	249
Hogan v. O'Neil, 255 U. S.	52	Judson Freight Forwarding Co. v.	
	611	Commonwealth, 242 Mass.	47
Holmes v. Hunt, 122 Mass.	505, 517		565
	61	Kane v. New Jersey, 242 U. S.	160
Holy Trinity Church v. United States,		88, 136	
143 U. S.	457	— v. Titus, 81 N. J. L.	594
	365		136
Holyoke v. Haskins, 5 Pick.	20	Karrick v. Wetmore, 210 Mass.	578
	468		727
Houle v. Abramson, 210 Mass.	83	Keith v. Maguire, 170 Mass.	210
	421		714
Howard v. Fessenden, 14 Allen,	124	Kelly v. Biddle, 180 Mass.	147
	306		118
Howland v. Parker, 200 Mass.	204	Kentucky v. Dennison, 24 How.	66
	99		611
Hub Construction Co. v. New England		Kibbe v. Antram, 4 Conn.	134, 139
Breeders' Club, 74 N. H.	282		152
	80	Kilgour v. Gratto, 224 Mass.	78
Hull v. Boston & Maine R. R., 210			452, 514
Mass.	159	Kimball v. Dern, 39 Utah,	181
	355		80
Hunt v. Bay State Iron Co., 97 Mass.		King v. Norcross, 196 Mass.	373
279	306		677
Huyser v. Commonwealth, 25 Ky. Law		— v. Viscoloid Co., 219 Mass.	420
Rep.	608		309
	652	Kingman v. Brockton, 153 Mass.	255
Hyatt v. Blackwell Lumber Co., 31			70, 642
Ida.	452	—, petitioner, 153 Mass.	566
	670		412
Hyatt v. Corkran, 188 U. S.	691	—, 170 Mass.	111
	104		412
Hylton v. United States, 3 Dall.	171	Kinneen v. Wells, 144 Mass.	497
	95		45
In re Beaumont (1893), 3 Ch.	190, 490	Kinney v. State, 45 Tex. Crim. Rep.	
	467	500	652
— Brannock, 131 Fed.	819	Kirkland v. Whately, 4 Allen,	462
	343		468
— Grimley, 137 U. S.	147	Kirkman v. McClaghry, 152 Fed.	255
	557		505
— Law Guarantee Soc. v. Munich		Kite v. Commonwealth, 11 Met.	581
Re-Ins. Co. (1912), 1 Ch.	138		505
	535	Kittinger v. Rossman, 12 Del. Ch.	276
— Neagle, 135 U. S.	1		639
	233	Knight v. Boston, 159 Mass.	551
— Turner, 119 Fed. Rep.	231		41
	233	Knox v. Coburn, 117 Me.	409
			80
		Kohl v. United States, 91 U. S.	367
			12

	PAGE		PAGE
Krakauer v. Chapman, 16 App. Div.		Mander v. Coleman, 95 N. Y. Sup.	696 658
115	318	Marble v. Treasurer and Receiver Gen-	
Lafayette Ins. Co. v. French, 18 How.		eral, 245 Mass.	504 388
404	89	Marcey v. Marcey, 9 Allen, 8	741
Lake Shore & Michigan Southern Ry.		Marks v. Wentworth, 199 Mass.	44 515
v. Chicago & Western Indiana R. R.,		Martin v. Gardner, 240 Mass.	350 343
97 Ill. 506	13	Martin L. Hall Co. v. Commonwealth,	
Lamar v. Micou, 112 U. S. 452	467	215 Mass. 326	734
Lascelles v. Georgia, 148 U. S. 537	610	Martin v. Waddell, 16 Pet. 367	267
Lawrence v. Board of Registration, 239		Mason v. Pearson, 118 Mass. 61	727
Mass. 424	737	Massachusetts General Hospital v.	
— v. Fletcher, 8 Met. 153	152	Belmont, 233 Mass. 190	334
Lawton v. Steele, 152 U. S. 133	165, 352	Massachusetts Institute of Technology,	
Leahy v. Street Commissioners, 209		188 Mass. 565	510
Mass. 316	406	Mass. Society, etc. v. Boston, 142 Mass.	
Lee v. Boston, 2 Gray, 484	701	24	574
— v. Lynn, 223 Mass. 109	334, 570	Mathews v. Kimball, 70 Ark. 451	359
— v. Marsh, 230 Penn. 351	372	Mayor of Medford v. Judge of District	
Leggett v. Levy, 233 Mo. 590	318	Court, 249 Mass. 465	699
Leser v. Garnett, 258 U. S. 130	446	Mayor, etc., of New York v. Sands,	
Lewis v. Brainerd, 53 Vt. 519	80	105 N. Y. 210	674
Lexington v. Suburban Land Co., 235		McAuliffe v. New Bedford, 155 Mass.	
Mass. 108	640, 677	216	736
Lithwines Trial, 4 How. St. Tr. 1269,		McCaffrey v. Smith, 41 Hun. (N. Y.)	
1273	82	117	677
Little v. Newburyport, 210 Mass. 414	575	McCarter, Atty. Gen., v. Dungan, 74	
Loan Assoc. v. Topeka, 20 Wall. 655	76,	N. J. Eq. 251	6
	643	McCray v. United States, 195 U. S. 27	134
Lochner v. New York, 198 U. S. 45	166, 333	McCullough v. McCullough, 44 N. J.	
Logan v. Mayor and Aldermen of Law-		Eq. 313	101
rence, 201 Mass. 506	697	McDonald v. Fire Engineers of Clin-	
Londonderry v. Chester, 2 N. H. 268	152	ton, 242 Mass. 587	38
Long Island Water Supply Co. v.		McGee v. Salem, 149 Mass. 238, 240	306
Brooklyn, 166 U. S. 685	12	McKeon v. New England R. R. Co.,	
Long v. State, 36 Tex. 6	652	199 Mass. 292	186
Lord v. Goldberg, 81 Cal. 596	708	McLean v. Arkansas, 211 U. S. 539	165,
Loring v. Young, 239 Mass. 349	382		335
Lowe v. Jones, 192 Mass. 94	101	McNichols v. Pease, 207 U. S. 100	105,
Lowell v. Boston, 111 Mass. 454	67, 70,		211, 612
	76, 642	Mead v. Acton, 139 Mass. 341	70,
Lowell, etc., Appellants, 22 Pick. 215	575		110, 642
Lunt v. Davison, 104 Mass. 498	390	Mears v. Sinclair, 1 W. Va. 185	467
Lynn Workingmen's Aid Association		Mendell v. Delano, 7 Met. 176	282
v. Lynn, 136 Mass. 283	578	Mercantile Bank v. New York, 121	
Lynnfield v. Peabody, 219 Mass. 322	266,	U. S. 138	549
	608	— v. Richmond, 256 U. S. 635	549
Madigan v. McCarthy, 108 Mass. 376	306	Merritt v. United States, 264 Fed. 870	249
Mahoney v. Boston, 171 Mass. 427	40	Metropolitan Life Ins. Co. v. Insurance	
— v. Lincolnville, 56 Me. 450	195, 255	Commissioner, 220 Mass. 52	486
Main v. County of Plymouth, 223		— v. Insurance Commissioner, 208	
Mass. 66	524, 641	Mass. 386	486
Main v. Sherman Co., 74 Neb. 155	328		

	PAGE		PAGE
Meyer v. Estes, 164 Mass.	457	New York Life Ins. Co. v. Hardison,	
Michael v. Michael, 34 Tex. Civil App.		199 Mass.	190
630	343	New York & New England R. R. Co.	
Milligan v. Drury, 130 Mass.	428	v. Bristol, 151 U. S.	556
Minneapolis v. Minneapolis St. Ry.			14, 332
Co., 215 U. S.	417	Newcomb & Rockport, 183 Mass.	76
Minnesota v. Barber, 136 U. S.	313		232
Minns v. Billings, 183 Mass.	126, 131	Northern Assurance Co. v. Meyer,	194
Minot v. Paine, 230 Mass.	514	Mich. 371	491
— v. Treasurer and Receiver Gen-	498	Northern Pacific Ry. Co. v. Douglas	
eral, 207 Mass.	588	County, 145 Wis.	288
— v. Winthrop, 162 Mass.	113		359
Mitchell v. Tibbetts, 17 Pick.	298	— v. Duluth, 208 U. S.	583
Moale v. Baltimore, 5 Md.	314		14, 336
Molly Varnum Chap. D. A. R. v. Low-		Norton v. Shore Line Electric Ry. Co.,	
ell, 204 Mass.	487	84 Conn. 24	452
Moore v. Sanford, 151 Mass.	285	Norwich v. County Commissioners, 13	
— v. Stoddard, 206 Mass.	395	Pick. 60	412
Moors v. Treasurer and Receiver Gen-	252, 583	Noyes v. Cushing, 209 Mass.	123
eral, 237 Mass.	254	O'Day v. Crabb, 269 Ill.	123
Morgan v. Commonwealth, 170 Ky.			328
400	652	Ohio v. Thomas, 173 U. S.	276
Moulton v. Commissioner of Corpora-			232
tions and Taxation, 243 Mass.	129	O'Keefe v. Somerville, 190 Mass.	110
Mount Hermon Boys' School v. Gill,			134,
145 Mass.	139		550
Munkley v. Hoyt, 179 Mass.	108	Old Colony R. R. Co. v. Framingham	
Munroe v. Woburn, 220 Mass.	116	Water Co., 153 Mass.	561
Murphy v. Mayor of Boston, 220 Mass.			13
73	706	Oliver v. Oliver, 169 Mass.	592, 593
Murray v. Cherrington, 99 Mass.	229		286
Mutual Benefit Life Ins. Co. v. Com-		— v. Washington Mills, 11 Allen,	268
monwealth, 227 Mass.	63		92, 545
Nelson v. First National Bank, 69 Fed.		Ollila v. Huikari, 237 Mass.	54
798	739		524
— v. Milford, 7 Pick.	18	Opinion of the Justices, 120 Atl.	629
New Bedford v. County Commissioners,			136
9 Gray,	346	— 21 R. I.	579
New England Hospital v. Boston, 113			623
Mass.	518	— 6 Cush.	573
New England, etc., S. S. Co. v. Com-			378, 385
monwealth, 195 Mass.	385	— 107 Mass.	604
New England Theosophical Corpora-			46, 107, 127, 580
tion v. Boston, 172 Mass.	60	— 122 Mass.	600
New Orleans Gas Co. v. Drainage			377, 595, 709
Commission, 197 U. S.	453	— 126 Mass.	557
— v. Louisiana Light Co., 115 U. S.			595
650	14, 332	— 148 Mass.	623
New York Bank Note Co. v. Kidder			595
Press Mfg. Co., 192 Mass.	391	— 150 Mass.	586
New York Life Ins. Co. v. Dodge, 246			582
U. S.	357	— 155 Mass.	598
	670		642
		— 160 Mass.	586
			45
		— 165 Mass.	599
			45, 107, 582
		— 175 Mass.	599
			77
		— 186 Mass.	603
			595
		— 190 Mass.	611
			76, 595
		— 190 Mass.	616
			624
		— 195 Mass.	607
			92, 545
		— 196 Mass.	603
			93, 134
		— 204 Mass.	607
			67, 70
		— 207 Mass.	601
			33, 570
		— 208 Mass.	603
			185, 677
		— 208 Mass.	614
			595
		— 208 Mass.	616
			92
		— 208 Mass.	619
			333
		— 208 Mass.	625
			186
		— 210 Mass.	609
			626
		— 211 Mass.	608
			76

	PAGE		PAGE
Opinion of the Justices, 211 Mass.	624	People v. Rose, 174 Ill.	310
— 211 Mass. 630	595	— v. Squire, 107 N. Y.	593
— 211 Mass. 632	625	— v. Steele, 231 Ill.	340
— 214 Mass. 602	595, 626	— v. Swafford, 65 Cal.	223
— 217 Mass. 607, 611	595	— <i>ex rel.</i> Thompson v. Brookfield,	
— 220 Mass. 613	92, 613	6 App. Div. (N. Y.)	398
— 220 Mass. 627	166, 333	— v. Village of Yonkers, 39 Barb.	
— 226 Mass. 607	377	(N. Y.) 266	658
— 231 Mass. 603	19, 366	— v. Warden of Prison, 157 N. Y.	
— 232 Mass. 601	83	116	619
— 233 Mass. 603	382	— v. Weller, 237 N. Y.	316
— 234 Mass. 597	412, 640	— v. Wells, 2 Cal.	198
— 239 Mass. 606	123, 170	— v. Yeager, 113 Mich.	228
— 240 Mass. 601	51, 108, 351, 582	Perkins v. Westwood, 226 Mass.	268
— 240 Mass. 611	45		352,
— 247 Mass. 589	565, 619		545, 617
Owensboro National Bank v. Owens-		Phi Beta Epsilon Corporation v. Bos-	
boro, 173 U. S. 664	548	ton, 182 Mass.	457
Pa. Co. for Insurance v. Philadelphia,		Philler v. Waukesha Co., 139 Wis.	211
262 Pa. 439	328	Phillips v. Boston, 150 Mass.	491
Pace v. Alabama, 106 U. S. 583	353	Phillips Academy v. Andover, 175	
Palmer v. Hampden, 182 Mass.	511	Mass. 118	179, 574
Parker v. Baxter, 2 Gray, 185, 189	304	Phinney v. Foster, 189 Mass.	182
Parkhurst v. Ginn, 228 Mass.	159	Physicians' Defense Co. v. O'Brien, 100	
Parkinson v. West End St. Ry. Co., 173		Minn. 490	553
Mass. 446	19	Physicians' Defense v. Cooper, 199 Fed.	
Patapasco Guano v. North Carolina,		576	553, 570
171 U. S. 345	407	Pierce v. Boston Five Cents Savings	
Peabody v. Boston & Providence R. R.		Bank, 125 Mass.	593
Corp'n., 181 Mass. 76	186	— v. Gould, 143 Mass.	234
Pedan v. Robb's Adm'r, 8 Ohio, 227	468	— v. Lamper, 141 Mass.	20
Penn. College Cases, 13 Wall., 190	18	Pittsburg & Southern Coal Co. v. Lou-	
Penn. Hospital v. Philadelphia, 245		isiana, 156 U. S.	590
U. S. 20	12	Plessy v. Ferguson, 163 U. S.	537
Pennsylvania Co. v. Chicago, 181 Ill.		Plumley v. Massachusetts, 155 U. S.	
289	677	461	407
People v. Brady, 275 Ill. 261	708	Pollock v. Farmers' Loan & Trust Co.,	
— v. Butler, 3 Cowen (N. Y.) 347	652	157 U. S. 429, 570; 158 U. S.	601,
— v. Compagnie Générale Trans-		623	95
atlantique, 107 U. S. 59	395	Pond v. Negus, 3 Mass.	230
— v. Conte, 17 Cal. App. 771	328	Portland Bank v. Apthorp, 12 Mass.	
— v. Elkus, 59 Cal. App. 396	623	252	92, 133, 545
— v. Hall, 51 N. Y. App. 57	84	Pottinger v. Wightman, 3 Meriv.	67
— v. Kerrigan, 73 Cal. 222	84	Powers v. Sturtevant, 200 Mass.	519
— v. Mercantile Credit Co., 166		Pratt v. Burdon, 168 Mass.	596
N. Y. 416	535	— v. Tuttle, 136 Mass.	233
— v. Montgomery, 13 Abb. Pr. Rep.		Prentice v. Richards, 8 Gray, 226	249
(N. S.) 207	328	Prudential Ins. Co. v. Cheek, 259 U. S.	
— v. Murray, 89 Mich. 276	84	530	335
— v. Potts, 264 Ill. 522	534	Putnam v. Johnson, 10 Mass.	488
— v. Priest, 206 N. Y. 274	639	Radclyffe v. Barton, 154 Mass.	157
		Railroad Co. v. Husen, 95 U. S.	465
		— v. Richmond, 96 U. S.	521

	PAGE		PAGE
Rand v. Commonwealth, 9 Gratt. (Va.)		Saranac Land & Timber Co. v. Comp-	
738	652	troller of New York, 177 U. S. 318 .	644
Raymer v. Tax Commissioner, 239		Savage v. Jones, 225 U. S. 501 . . .	407
Mass. 410	725	— v. Shaw, 195 Mass. 571	374,
Raynes v. Bennett, 114 Mass. 424 .	249		524, 600
Rea v. Aldermen of Everett, 217 Mass.		School Directors v. James, 2 Watts. &	
427	289	S. 568	467
Reagan v. Union Mutual Life Ins. Co.,		School District No. 3 v. Western Tube	
189 Mass. 555	692	Co., 13 Wy. 304	658
Redemptorist Fathers v. Boston, 129		Schreiber v. Chicago & Evanston R. R.	
Mass. 178	577	Co., 115 Ill. 340	640
Reed v. Sharon (1868), 35 Conn. 191 .	195,	Scituate v. Weymouth, 108 Mass. 128	412
	255	Selectmen of Brookline, petitioners,	
Reformed Dutch Church v. Bradford,		236 Mass. 260	335
8 Cowen, 457	152	Selectmen of Natick v. Boston & Al-	
Reid v. Colorado, 187 U. S. 137 . . .	408	bany R. R. Co., 210 Mass. 229 . . .	252
Reutener v. Cleveland, 107 Ohio St.		Settle v. Van Evrea, 49 N. Y. 280 . .	706
117	623	Shattuck v. Burrage, 229 Mass. 448 .	99
Revere v. Boston Copper Co., 15 Pick.		— v. Lovejoy, 8 Gray, 204	466
351	5	Shaw v. Royce (1911), 1 Ch. 138 . . .	535
Richardson v. Essex Institute, 208		Shawmut Commercial Paper Co. v.	
Mass. 311	574	Brigham, 211 Mass. 72	607
Rippucci v. Commonwealth Construc-		Shea v. Metropolitan Stock Exchange,	
tion Co., 190 Mass. 518	493	168 Mass. 282	607
Robbins v. Borman, 1 Pick. 122 . . .	677	— v. Parker, 234 Mass. 592	80
Roberts v. Hawkins, 70 Mich. 566 . . .	568	Sheldon v. Congregational Parish in	
Robertson v. Baldwin, 165 U. S. 275 .	508	Easton, 24 Pick. 281	152
Robinson's Case, 131 Mass. 376 . . .	48	Shields v. Barrow, 17 How. 130, 144 .	383
Roby v. New York Central R. R., 142		Simplex Elec. Heating Co. v. Common-	
N. Y. 176	282	wealth, 227 Mass. 225	300
Rockport v. Webster, 174 Mass. 385 .	266	Sklaroff v. Commonwealth, 236 Mass.	
Round v. Police Commissioner, 197		87	265
Mass. 218	9	Slater v. Gunn, 170 Mass. 509	264
Russell v. Failor, 1 Ohio St. 327 . . .	568	Slater v. Taylor, 241 Ill. 102	2
Russell v. Howe, 12 Gray, 147	190	Smith v. Bay State Savings Bank, 202	
Rutter v. White, 204 Mass. 59	288	Mass. 482	421
Sackett v. Sanborn, 205 Mass. 110 . .	400	Smith v. Texas, 223 U. S. 630	166
St. Mary's Woolen Mfg. Co. v. Brad-		South Lancaster Academy v. Lancas-	
ford Co., 14 Ohio C. Ct. 522	359	ter, 242 Mass. 553	574
St. Paul's Church v. Attorney General,		Southern Pacific R. R. Co. v. San Fran-	
164 Mass. 188	575	cisco Savings Union, 146 Cal. 290 . .	640
Salem-Fairfield Telephone Assoc. v.		Sparhawk v. Sparhawk, 116 Mass. 315	625
McMahon, 78 Ore. 477	118	Spaulding v. Smith, 162 Mass. 543 . .	359
Salem Lyceum v. Salem, 154 Mass. 15	179,	Spofford v. Carleton, 238 Mass. 528 .	375
	575	Sprague v. Minon, 195 Mass. 581 . . .	263
Salisbury Land & Improvement Co. v.		Springfield v. Springfield St. Ry. Co.,	
Commonwealth, 215 Mass. 371	12, 64,	182 Mass. 41	29
	110, 616	Sproule v. Fredericks, 69 Miss. 898 . .	385
Samburg v. American Express Co., 136		State v. Bell, 212 Mo. 111	328
Mich. 639	319	— v. Brooks, 92 Mo. 542	84
Sands v. Old Colony Trust Co., 195		— v. Carragan, 36 N. J. L. 52	639
Mass. 575	99		

	PAGE		PAGE
State v. Conn. Mut. Life Ins. Co., 106		Teasdale v. Newell & Snowling Con-	
Tenn. 282	670	struction Co., 192 Mass. 440 . . .	661
— v. Downes, 59 N. H. 320 . . .	359	Tennessee v. Davis, 100 U. S. 257 .	232
— v. Ehrlick, 65 W. Va. 700 . . .	49	The Dublin Case, 38 N. H. 459, 543 .	152
— v. Express Co., 60 N. H. 219 . .	136	Thayer Academy v. Assessors of Brain-	
— v. Latham, 115 Me. 176	168	tree, 232 Mass. 402	574
— v. Middlesex Banking Co., 87		Thayer v. Boston, 124 Mass. 132 . .	701
Conn. 483	80	— v. Felt, 4 Pick. 354	722
— v. Norwich & Worcester R. R.		The Penn, 273 Fed. 990	249
Co., 30 Conn. 290	2	Thomas v. Municipal Council of Low-	
— v. Robinson, 101 Minn. 277 . . .	49	ell, 227 Mass. 116	699
— v. Smith, 153 La. 578	708	Thornberg v. Allman, 8 Ind. App. 531	568
— v. Teipner, 36 Minn. 535	328	Thorpe v. Lund, 227 Mass. 474, 482 .	575
— v. Township 9, 7 Ohio St. 64 . .	151	Tilton v. Tilton, 196 Mass. 562 . .	374, 600
— v. Turner, 34 Ore. 173	392	Tipton v. Tipton, 87 Ky. 243	343
Steamship Co. v. Joliffe, 2 Wall. 450 .	322	Todd v. Sawyer, 147 Mass. 570 . . .	99
Stevens v. Commonwealth, 4 Met. 360	652	Toupin v. Peabody, 162 Mass. 473 . .	373, 600
— v. Worcester, 196 Mass. 45 . . .	328	Townsend v. Kendall, 4 Minn. 412 . .	468
Stevenson v. Donnelly, 221 Mass. 161	722	Trial of the Seven Bishops, 12 How.	
Stone v. Charlestown, 114 Mass. 214 .	66	St. Trials, 183	633
— v. Farmer's Loan & Trust Co., 116		Trask v. Little, 182 Mass. 8	306
U. S. 307	332	Tremont & Suffolk Mills v. Lowell, 165	
— v. Forbes, 189 Mass. 163	99	Mass. 265	734
— v. Kellogg, 165 Ill. 192	80	Trinity Church v. Boston, 118 Mass.	
— v. Old Colony St. Ry. Co., 212		164	578
Mass. 459	669	Truax v. Raich, 239 U. S. 33	333, 570
— v. Penn Yan, etc., Ry., 197 N. Y.		Trustees of Wesleyan Academy v. Wil-	
279	670	braham, 99 Mass. 509	574
— v. Smith, 159 Mass. 413	737	Tucker v. Boston, 223 Mass. 478 . .	699
Stoughton v. Baker, 4 Mass. 522 . .	51,	— v. Tower, 9 Pick. 109	677
	110, 637	Turner v. Gardner, 216 Mass. 65 . . .	12
— v. Cambridge, 165 Mass. 251 . . .	342	— v. New York, 168 U. S. 90	645
Strassheim v. Daily, 221 U. S. 280	105, 611	— v. Nye, 154 Mass. 579	181
Strouse v. American Credit Ins. Co.,		Tyler v. Hudson, 147 Mass. 609 . . .	640
91 Md. 244	535	— v. Treasurer and Receiver Gen-	
Suburban Light & Power Co. v. Bos-		eral, 226 Mass. 306	322, 601
ton, 153 Mass. 200	288	Union Inst. for Savings v. Boston, 224	
Sullivan v. Detroit, etc., Ry., 135 Mich.		Mass. 286	185
661	708	United States v. American Woolen Co.,	
Summers v. State, 5 Tex. App. 365 . .	328	265 Fed. 404	249
Supervisors of Election, 114 Mass. 247	706	— v. Cruikshank, 92 U. S. 542	635
Swan v. Justices of the Superior Court,		— v. Howe Fed. Cas. No. 15, 404a . .	327
222 Mass. 542	725	— v. Jones, 109 U. S. 513	508
Sweet v. Rechel, 159 U. S. 380 . . .	65	— v. San Francisco Bridge Co., 88	
Sweetser v. Emerson, 236 Fed. 161 . .	373,	Fed. Rep. 891	233
	600	Upham v. Draper, 157 Mass. 292 . .	102
Taft v. Adams, 3 Gray, 126	45	Vanhorne v. Dorrance, 2 Dall. 304 . .	14
— v. Lord, 92 Conn. 539	106	Varney v. Baker, 194 Mass. 239 . . .	80
Talbot v. Hudson, 16 Gray, 417 . . .	181	Viles v. Waltham, 157 Mass. 542 . .	701
Tanner v. Little, 240 U. S. 369 . . .	334, 352	Virginia v. Tennessee, 148 U. S. 503 .	741
Tax Commissioner v. Putnam, 227		Voight v. Wright, 141 U. S. 62 . . .	408
Mass. 522	547		

	PAGE		PAGE
Wagner v. Scherer, 89 N. Y. App. Div. 202	41	White v. Howard, 52 Barb. 294	468
Walker v. Treasurer and Receiver Gen- eral, 221 Mass. 600	498	Whiting v. Malden & Melrose R. R. Co., 202 Mass. 298	19
Ware v. Fitchburg, 200 Mass. 61	66	Whitney v. Commonwealth, 190 Mass. 531	260
Warren v. Stearns, 19 Pick. 73	726	Whittaker v. Salem, 216 Mass. 483	70, 76, 110, 642, 700
Waterbury v. Platt, 76 Conn. 435	14	Wiggin v. Swett, 6 Met. 194	452
Watson v. Boston, 209 Mass. 18	574	Wight v. Heublein, 111 Med. 649	80
Wattles <i>ex rel.</i> Johnson v. Upjohn, 211 Mich. 514	623	Willard Hotel Co. v. District of Colum- bia, 23 App. D. C. 272	678
Watuppa Reservoir Co. v. Fall River, 147 Mass. 548	263	Williams v. Johnson, 208 Mass. 544	117
Webb v. Page, 1 Car. & K. 23 (Eng.)	327	Williston Seminary v. County Com- missioners, 174 Mass. 427	574
Welch v. O'Meara, 195 Mass. 541	698	Wilson v. Head, 184 Mass. 515	321, 734
— v. Swasey, 193 Mass. 364	451	Winnisimmet Co. v. Grueby, 209 Mass. 1	64
Weld v. Gas & Electric Light Commis- sioners, 197 Mass. 556	726	Wolf v. Germania Ins. Co., 149 Wis. 576	243
Wesson v. Washburn Iron Co., 13 Al- len, 95	452	Wood v. People, 53 N. Y. 511	652
West End St. Ry. Co. v. Malley, 246 Fed. 625	368	Worcester v. Board of Appeal, 184 Mass. 460	725
West River Bridge Co. v. Dix, 6 How. 507	13	— v. Boston, 179 Mass. 41	304
West Roxbury v. Stoddard, 7 Allen, 158 U. S. 274	263	— v. Worcester, etc., St. Ry. Co., 182 Mass. 49	29
Western Union Tel. Co. v. Chiles, 214 U. S. 274	233	— — — 196 U. S. 539	29
— v. New York, 38 Fed. 552	14	Worden v. New Bedford, 131 Mass. 23	64
Wetmore v. Karrick, 205 U. S. 141	727	Wright v. Lyons, 224 Mass. 167	58, 452, 514
Whately v. Hatfield, 196 Mass. 393	342	— v. Walcott, 238 Mass. 432	64, 130, 616
Wheaton College v. Norton, 232 Mass. 141	574	Wurts v. Hoagland, 114 U. S. 606	181
Wheeler v. Hollis, 19 Tex. 522	467	Wyeth v. Cambridge Board of Health, 200 Mass. 474	165, 170, 352, 401
— v. Jackson, 137 U. S. 245	644	Yard v. Ocean Beach Association, 49 N. J. Eq. 306	359
— v. Watertown Fire Ins. Co., 131 Mass. 1	492	Yick Wo v. Hopkins, 118 U. S. 356	453
Wheelock v. Lowell, 196 Mass. 220, 225 Wheelwright v. Tax Commissioner, 235 Mass. 584	110 735		

OPINIONS

OF

JAY R. BENTON, ATTORNEY-GENERAL

TAXATION — TRUST COMPANIES — MEANING OF WORDS “CAPITAL STOCK.”

The words “the total amount of its capital stock,” in G. L., c. 63, § 58, are intended to describe the amount of capital stock authorized, issued and paid in in cash. So long as a trust company is not dissolved and is not prevented by the State itself from doing business, it is subject to the franchise tax imposed by G. L., c. 63, § 58.

You have requested my opinion as to the application of G. L., c. 63, § 58, in respect to two trust companies which have applied for abatement of taxes assessed to them for the year 1922 under said section; one on the ground that on April 1, 1922, it had no assets whatever, having transferred all of its assets to another trust company which had assumed its liabilities; and the other on the ground that on that date the stock of the company had been turned over to liquidating agents under an agreement for merger with another trust company, which had been approved by the Commissioner of Banks, and the stockholders had voted that proceedings be taken for the dissolution of the company.

G. L., c. 63, § 58, is as follows: —

Every corporation subject to section fifty-three or fifty-four shall annually pay a tax upon its corporate franchise, after making the deductions provided for in section fifty-five, at a rate equal to the average of the annual rates for three years preceding that in which such assessment is laid, the annual rate to be determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same year, as returned by the assessors of the several towns under section forty-seven of chapter fifty-nine, upon the aggregate

To the Com-
missioner of
Corporations
and Taxation.
1923
January 22.

valuation of all towns for the preceding year, as returned under sections forty-seven and forty-nine of chapter fifty-nine; but the total amount of the tax to be paid by a trust company in any year upon the value of its corporate franchise shall amount to not less than two fifths of one per cent of the total amount of its capital stock, surplus and undivided profits at the time of said assessment, as found by the commissioner.

The questions presented are, first, whether the words "the total amount of its capital stock," used in section 58, mean the amount of the capital stock of the corporation or the value of its capital assets, including franchises and good will, less its liabilities; and, secondly, whether or not the two trust companies referred to were subject to said section.

In the strict and proper sense the "capital stock" of a corporation is the amount paid in, or to be paid in, as the capital upon which the corporation is to do business. *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389, 392; *State v. Norwich & Worcester R.R. Co.*, 30 Conn. 290, 293; *Commercial Fire Ins. Co. v. Board of Revenue, Montgomery Co.*, 99 Ala. 1, 7; *Slater v. Taylor*, 241 Ill. 102, 108; *Cook on Corporations*, 6th ed., § 8; 14 C. J. 379.

In our corporation laws the term "capital stock" is generally, if not uniformly, used to designate stock authorized or issued.

By G. L., c. 172, concerning trust companies, it is provided in section 7 that the agreement of association shall specifically state "the amount of its capital stock, and the number of shares into which it is to be divided," and in section 11 that, as a preliminary to the transaction of business, it must appear that the whole capital stock has been issued and paid in in cash.

G. L., c. 172, § 18, is as follows: —

The capital stock of such corporation shall be not less than two hundred thousand dollars, except that in a city or town whose population numbers not more than one hundred thousand the capital stock may be not less than one hundred thousand dollars, divided into shares of the par value of one hundred dollars each; and except also that in towns

whose population is not more than ten thousand the capital stock may be not less than fifty thousand dollars divided into shares of the par value of one hundred dollars each; and no business shall be transacted by the corporation until the whole amount of its capital stock is subscribed for and actually paid in. Any such corporation may, subject to the approval of the commissioner, increase its capital stock in the manner provided by sections forty-one and forty-four of chapter one hundred and fifty-six. No stock shall be issued by any such corporation until the par value thereof shall be fully paid in in cash. Any such corporation may, subject to the approval of the commissioner, decrease its capital stock in the manner provided by said section forty-one and the first sentence of section forty-five of said chapter; provided, that the capital stock as so reduced shall not be less than the amount required by this section.

The franchise tax imposed by G. L., c. 63, §§ 53-60, is assessed on the value of the corporate franchise, with certain deductions, that value, by section 55, being defined as "the fair cash value of all the shares constituting its capital stock on April first preceding."

In the form of return which the Commissioner requires from trust companies the first three items on the side of liabilities are Capital Stock, Surplus, Undivided Profits.

The provision in G. L., c. 63, § 58, imposing a minimum tax on trust companies measured by the amount of capital stock, surplus and undivided profits, was first enacted by Gen. St. 1918, c. 264, § 1, which amended St. 1909, c. 490, pt. III, § 43 (as last amended by Gen. St. 1918, c. 222), by adding that provision at the end thereof. At the end of said section 43, before the amendment made by Gen. St. 1918, c. 264, § 1, was the following provision:—

and the total amount of the tax to be paid by such (domestic business) corporation in any year upon its property locally taxed in this commonwealth and upon the value of its corporate franchise shall amount to not less than one tenth of one per cent of the market value of its capital stock at the time of said assessment as found by the tax commissioner.

Section 43, as thus amended, contained both these provisions, the later immediately following the earlier. One relates to domestic business corporations and the other to

trust companies. Both are provisions for minimum taxes, one purporting to be measured by the *market value* of the capital stock and the other by the *amount* of the capital stock, to which the amount of surplus and undivided profits is to be added. In my judgment, it is clear that the Legislature, in using the words "the total amount of its capital stock," which appear in Gen. St. 1918, c. 264, § 1, and in G. L., c. 63, § 58, intended to distinguish "amount" from "value," and meant to describe the amount of capital stock authorized, issued and paid in in cash.

I take up now the question whether the two trust companies mentioned by you were subject to section 58.

In a recent opinion my predecessor advised you with reference to the taxation of certain trust companies, some of which were in the hands of the Commissioner of Banks on April first, and others of which had ceased to do business on April first, that the former were not subject to tax, but that the latter were liable to pay a franchise tax. VI Op. Atty. Gen. 309. This opinion was given on the authority of *Greenfield Savings Bank v. Commonwealth*, 211 Mass. 207, and *Attorney General v. Mass. Pipe Line Gas Co.*, 179 Mass. 15, 19. In the latter case the rule is stated in the following words:—

The franchise which subjects the corporation to taxation is the right to do business legally by complying with the laws. A corporation having this right under legislative action cannot relieve itself from liability to taxation by neglecting to do business, or ceasing to do business. Its franchise remains, and it may do business when it chooses. Nor can it escape taxation by failing to comply with a statute which is intended to regulate its conduct while doing business, or before commencing business. Whatever the effect of such conditions upon the amount to be assessed, after it once has a capital stock divided into shares nothing short of the loss of the franchise as a power that may be exercised, if the corporation chooses to comply with the law, can leave it free from liability to taxation under the statute.

So long as a corporation is not dissolved its franchise is outstanding and, in my opinion, is subject to tax, except

when by the authority of the State itself a corporation is not permitted to do business. The tax levied by G. L., c. 63, § 58, is a franchise tax, *i.e.*, a tax on the right to do business, and in that respect is to be distinguished from the tax levied by G. L., c. 63, §§ 32-51, which is an excise with respect to the carrying on or doing of business, to which only corporations engaged in business are subject. VI Op. Atty. Gen. 93.

It is my opinion that the trust companies which you name, since on April 1, 1922, they were not dissolved and were not prevented by the State from doing business, were subject to tax for 1922 under section 58, and that the fact that one of the companies had made an agreement with another trust company for a merger, that the stock had been put in the hands of a liquidating committee, and that the stockholders had voted to petition for dissolution of the corporation, does not take the case from the operation of the rule. *Revere v. Boston Copper Co.*, 15 Pick. 351, 359, 360; *Boston Glass Manufactory v. Langdon*, 24 Pick. 49; *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71; Morawetz on Corporations, § 1011.

MILITARY SUPPLIES — MILITARY PURPOSES.

"Military supplies" are such supplies as are used for the maintenance of the militia in suitable efficiency.

The term "military purposes" comprehends all such uses as may be said to be incidental to the general purpose to conserve the military needs of the regimental organization.

You have requested my opinion as to whether "sundry miscellaneous articles, such as auto supplies and equipment, gas and oil, office furniture and equipment, office supplies, printing, stationery and postage," used by the Adjutant General's Department, are military supplies, within the purview of St. 1922, c. 545, § 10.

The pertinent provisions of that statute are as follows: —

To the Commission on
Administration
and Finance.
1923
January 25.

SECTION 10. All materials, supplies and other property, except legislative or *military supplies*, needed by the various executive and administrative departments and other activities of the commonwealth shall be purchased by or under the direction of the purchasing bureau in the manner set forth in the three following sections. . . .

SECTION 11. No supplies, equipment or other property, other than for legislative or *military purposes*, shall be purchased or contracted for by any State department, office or commission unless approved by the state purchasing agent as being in conformity with the rules, regulations and orders made under the following section. . . .

Supplies used by the Adjutant General's Department are not necessarily "military supplies" or for "military purposes." "Military supplies" may be defined as such supplies as are used for the maintenance of the militia in suitable efficiency. Thus the construction and maintenance of armories may reasonably be treated as necessary for the maintenance of the militia in suitable efficiency. *Hodgdon v. Haverhill*, 193 Mass. 406, 409. The term "military purposes" comprehends all such uses as may be said to be incidental to the general purpose to conserve the military needs of the regimental organization. *McCarter, Attorney General, v. Dungan*, 74 N. J. Eq. 251, 252.

No supplies may be purchased or contracted for by the Adjutant General's Department except such as come within the meaning of "military supplies" or are for "military purposes." Whether or not particular supplies are military supplies or are used for military purposes is a question of fact in each instance.

ELECTION — REGISTRARS OF VOTERS — RECOUNT — CLERICAL ASSISTANCE — GUARD RAIL.

Clerical assistants appointed under G. L., c. 54, § 135, may, under the supervision of the registrars of voters, do the actual counting of ballots at recounts.

Such assistants need not be sworn.

There is no provision of law requiring that a guard rail shall be set up at the place of a recount of ballots.

I have the request of the Committee on Elections of the House of Representatives (to which was referred the petitions of Napoleon Bergeron and John Hayes, claiming that they were elected to your body from the Twelfth Essex Representative District) for my opinion on three matters.

To the House
Committee on
Elections.
1923
January 26.

1. Must the registrars of voters of a city or town personally do the actual recounting of ballots?

G. L., c. 54, § 135, provides for a recount of ballots by the registrars, and in that section it is stated that "registrars of voters may employ such clerical assistance as they deem necessary to enable them to carry out this section." Unless the clerical assistance is to be in the recounting of the ballots, it is difficult to find any need for any such authorization, having in mind the things required by said section. Assuming, therefore, that you wish to know whether the registrars only must do the counting of the ballots, I advise you that those employed by them under the provision above quoted may, under their supervision, do in whole or in part the actual counting.

2. Must the clerical assistants to the registrars, as provided in G. L., c. 54, § 135, last paragraph, be sworn, in any event?

The paragraph to which you refer is the provision above quoted. I do not find any statutory requirement to that effect, such as exists in the case of election officers. I am therefore of the opinion that they need not be sworn.

3. Do unauthorized persons have a right to go behind the guard rail?

There is no provision of law, such as exists in regard to voting places at primaries or elections, which requires registrars to set up a guard rail. The statute requires that each candidate "shall be allowed to be *present* and *witness* such recount, either in person, accompanied by counsel, if he so desires, or by an agent appointed by him in writing. It is a question of fact in each instance whether such opportunity to be present and witness the recount has been afforded.

RECORDS — PUBLIC RECORDS — PUBLIC INSPECTION.

The only records open to public inspection are public records and those which some statute specifically provides shall be so open.

Public records are records required by law to be filed, or upon which the law requires an entry to be made.

To the Com-
missioner of
Civil Service.
1923
February 5.

You request my opinion as to whether certain books and papers of the Board of Registration in Pharmacy are open to the inspection of the public, representatives of the press or attorneys at law.

The only records open to public inspection are public records and those which some statute specifically provides shall be so open.

G. L., c. 66, § 10, provides:—

Every person having custody of any public records shall, at reasonable times, permit them to be inspected and examined by any person, under his supervision, and shall furnish copies thereof on payment of a reasonable fee. . . .

R. L., c. 35, § 5, now G. L., c. 66, § 3, provides:—

In construing the provisions of this chapter and other statutes, the words "public records" shall, unless a contrary intention clearly appears, mean any written or printed book or paper, any map or plan of the commonwealth or of any county, city or town which is the property thereof and in or on which any entry has been made or is required to be made by law, or which any officer or employee of the commonwealth or of a county, city or town has received or is required to receive for filing, . . .

This section relates only to books, papers, maps and plans which are "intended for the use of the public" and required by law to be filed, or upon which the law requires an entry to be made. *Round v. Police Commissioner*, 197 Mass. 218; I Op. Atty. Gen. 186, 278, 280, III Op. Atty. Gen. 122, 136, 351.

A former Attorney-General, in an opinion (II Op. Atty. Gen. 381), relative to this section, said:—

This legislative definition cannot be held to include within its intention every paper which an officer of the Commonwealth receives and files. It must be limited to such as he is required by law to so receive for filing. Any other construction must be prejudicial to the rights and interests of the Commonwealth or its officers, and indeed, of parties or persons making communications with such officers.

G. L., c. 66, § 3, defines "record," and merely refers to "public records" without defining them. The definition of "public records" previously established is, however, carried over into this act, since no clear intent to the contrary appears.

Only such records, therefore, as you are required by some specific statute to keep, receive for filing, or upon which you are required to make an entry, are open to public inspection.

G. L., c. 112, § 25, provides:—

The board shall keep a record of the names of all persons examined and registered by it, of all persons to whom permits are issued under section thirty-nine, and of all money received and disbursed by it, and a duplicate thereof shall be open to public inspection in the office of the state secretary . . .

I am therefore of the opinion that only the records referred to in the above section are open to the inspection of the general public. Representatives of the press and attorneys at law stand upon no different footing from the general public. A registered pharmacist, against whom a com-

plaint or charge is pending before the board, or his counsel, has, in addition to his right of inspection as a member of the public, a right of access to certain other documents.

G. L., c. 112, § 33, provides:—

A registered pharmacist against whom a complaint or charge is pending before the board, or his counsel, shall have the same right of access to documents in the possession of said board as a person charged with crime in the courts of the commonwealth would have to documents in the possession of the clerk of the court or the prosecuting officer.

This would include a right of access to the complaint, entries made thereon, the finding of the board, and any deposition (not affidavits) which might be taken. What other documents might be included would depend upon the facts of the specific case.

You inquire further whether transcripts of the testimony given at hearings "should be provided, either at the State's expense or at the expense of the person desiring the same, or whether they should be provided at all except through summons and court process." I find no provision of law requiring the board to have stenographic notes taken of such testimony, and I am consequently of the opinion that you are not required to furnish transcripts under any circumstances. A stenographer, when duly summoned, may be required to read his notes in any judicial proceedings. Whether or not you should furnish a transcript of such testimony to parties in interest, and under what terms such transcript should be supplied, is a matter of policy for you to determine.

CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACT —
 EMINENT DOMAIN — POLICE POWER — BOSTON ELE-
 VATED RAILWAY COMPANY — EASTERN MASSACHU-
 SETTS STREET RAILWAY COMPANY.

The power to take property by eminent domain and the police power are sovereign powers which cannot be granted away by contract with the State.

Certain bills, if enacted, would be unconstitutional, for reasons stated in previous opinions.

A bill providing for the construction of a tunnel in Boston and a lease thereof to the Boston Elevated Railway Company, with a proviso that if the company does not consent thereto its elevated structures shall be removed without compensation, would, if enacted, be unconstitutional as an impairment of the contract contained in Spec. St. 1918, c. 159, and an arbitrary confiscation of the company's property.

A bill providing for an amendment of Spec. St. 1918, c. 159, to take effect on its acceptance by the Boston Elevated Railway Company, if enacted, would be constitutional, under circumstances stated in the opinion.

Bills providing for the taking by eminent domain of property of the Eastern Massachusetts Street Railway Company and leasing the same to the Boston Elevated Railway Company would be constitutional, if enacted.

On behalf of the committee on rules you have asked my opinion upon the constitutionality of several street railway bills now pending before the committee. Within the past two years my predecessor has given opinions to committees of the House of Representatives on the constitutionality of bills relating directly or indirectly to the service and management of the Boston Elevated Railway Company and Eastern Massachusetts Street Railway Company, involving a consideration of the application and effect of Spec. St. 1918, c. 159, and Spec. St. 1918, c. 188. VI Op. Atty. Gen. 147, 396. In these opinions he ruled that the provisions in each of said statutes relating to the right of the trustees to regulate and fix fares and to determine the character and extent of the service and the facilities to be furnished, and the right of the directors to pass upon contracts for the construction or operation of additional lines, constituted contracts between the Commonwealth and the companies concerned which could not be impaired without violating U. S. Const., art. I, § 10, and that a number of the bills submitted would, if enacted into law, be unconstitutional

To the
 House of Rep-
 resentatives.
 1923
 February 6.

because they contained provisions which would directly impair the contractual rights given by the two special statutes of 1918.

With reference to Spec. St. 1918, c. 158, the court held, in *Boston v. Treasurer and Receiver General*, 237 Mass. 403, 413, 414, that that statute, "having been accepted by the railway companies (the Boston Elevated Railway Company and the West End Street Railway Company), constitutes an agreement between the Boston Elevated Railway Company and the Commonwealth that the latter shall take over the management and operation of the railway company and shall pay therefor the amounts specified in way of compensation for the use thereof," and that the act is constitutional.

Some of the bills on which my opinion is asked are plainly open to the objections stated in the opinions of my predecessor. Others involve wholly different considerations.

Several of the bills provide for the taking of the property of one or the other of the two companies in the exercise of the power of eminent domain or of the police power. It is therefore desirable at the outset to state some of the more fundamental principles governing the nature, extent and limitations of those powers and the manner in which they must be exercised.

The power to take property by eminent domain for public use is one of the high prerogatives of government. *Turner v. Gardner*, 216 Mass. 65, 70; *Kohl v. United States*, 91 U. S. 367, 371. It cannot be granted away by contract with the State. Such a grant, if it were attempted to be made would not come under the protection of the contract clause of the Federal Constitution. *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20. The fact that the taking renders impossible further performance of a contract touching the property taken does not impair the obligation of such contract. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685.

The property taken must be appropriated to public and not private uses. Mass. Const., pt. I, art. X; *Salisbury*

Land & Improvement Co. v. Commonwealth, 215 Mass. 371, 377. Property already devoted to a public use may be taken for a different public use, and such an exercise of the right of eminent domain over property or rights in the nature of property previously granted by the State does not impair the obligation of a contract. Franchises, like other property, are subject to the sovereign right of eminent domain. *Boston Water Power Co. v. Boston & Worcester R.R. Corp.*, 23 Pick. 360; *Central Bridge Corp. v. Lowell*, 4 Gray, 474, 481; *Eastern R.R. Co. v. Boston & Maine R.R.*, 111 Mass. 125, 131; *Old Colony R.R. Co. v. Framingham Water Co.*, 153 Mass. 561; *West River Bridge Co. v. Dix*, 6 How. 507.

But property cannot be taken from one party who holds it for a public use and given to another to hold in the same manner for precisely the same public use. Such a taking, effecting a mere change of control, cannot be founded on a public necessity. *Boston Water Power Co. v. Boston & Worcester R.R. Corp.*, 23 Pick. 360, 393; *Cary Library v. Bliss*, 151 Mass. 364, 378-380; *Lake Shore & Michigan Southern Ry. v. Chicago & Western Indiana R.R.*, 97 Ill. 506.

In this connection the provisions in Spec. St. 1918, c. 159, § 16, and Spec. St. 1918, c. 188, § 19, reserving the right of the Commonwealth to acquire the property and franchises of the respective companies at any time through the exercise of the power of eminent domain, should be noted. While these provisions cannot be taken to diminish the power of the Commonwealth to take property by eminent domain in any case, they may have the effect of an agreement by the companies that their property may be taken by the Commonwealth even if such taking works a mere change of control.

There is a further constitutional requirement that "reasonable compensation" must be paid. Declaration of Rights, art. X. It seems to be generally accepted that compensation must be made in money, to be paid within a reasonable time after the taking, and that future obligations cannot be substituted. *Attorney General v. Old Colony*

R.R. Co., 160 Mass. 62, 90, 91; *Commonwealth v. Peters*, 2 Mass. 125; *Vanhorne v. Dorrance*, 2 Dall. 304; *Waterbury v. Platt*, 76 Conn. 435.

The police power similarly is a sovereign power of which the State cannot be divested by any act of Legislature. *Commonwealth v. Alger*, 7 Cush. 53, 85; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650. "A requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts." *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583, 596. This principle has been applied in decisions sustaining regulations requiring railroad companies at their own expense to move grade crossings (*New York & New England R.R. Co. v. Bristol*, 151 U. S. 556; *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583); requiring a railroad company to remove a railroad track from a city street (*Denver & R. G. R.R. Co. v. Denver*, 250 U. S. 241); requiring a gas company at its own expense to change the location of gas pipes to accommodate a system of drainage (*New Orleans Gas Co. v. Drainage Commission*, 197 U. S. 453); and requiring overhead wires to be removed and placed under ground (*People v. Squire*, 107 N. Y. 593; *Western Union Tel. Co. v. New York*, 38 Fed. 552). But the exercise of the power must be reasonable in its character, and, under the guise of legislation for the public good, property cannot be arbitrarily confiscated or destroyed. *Durgin v. Minot*, 203 Mass. 26; *Dobbins v. Los Angeles*, 195 U. S. 223; *Dillon, Municipal Corporations*, 5th ed., §§ 1269, 1270.

With these preliminary observations I now proceed to a particular consideration of the bills which you have submitted to me.

1. *Petition for the establishment of five-cent fare zones for transportation on the street railways in the city of Lynn.*

The bill submitted with this petition provides specifically that the Eastern Massachusetts Street Railway Company shall carry passengers on its cars within certain areas for five cents. Such a provision would be a direct impairment of the right given the trustees by Spec. St. 1918, c. 188, to regulate and fix fares on the lines of that company.

2. Petition for the construction of an additional tunnel and subway in the city of Boston and the removal of the elevated railway structure in the Charlestown district of said city.

The bill accompanying this petition in substance provides that the Boston Transit Commission shall construct a tunnel and subway from the northerly end of the present Washington Street tunnel to Sullivan Square; that the commission shall within ninety days after the passage of the act execute with the Boston Elevated Railway Company, in the name of the city, the company consenting thereto, a contract in writing for the sole and exclusive use of the tunnel and subway and appurtenances, for a period not beyond the period of existing leases of subways to the company, at an annual rental of four and one-half per cent of the net cost; that at the next city election the question shall be submitted to the voters of the city of Boston whether they favor the removal of the elevated structure and the substitution therefor of subways or tunnels in the city of Boston; that if a majority of the voters actually voting answer the question in the affirmative, and if the company shall not execute the contract with the commission, the company shall forthwith discontinue the use of and remove its elevated structures between the present Washington Street tunnel and Sullivan Square and between the present Washington Street tunnel and Dudley Street, together with all connections, deflections, loops, stations, etc., and any locations theretofore granted to the company between said points shall be thereafter revoked as being a menace to the public health and a detriment to the public welfare; but that if the contract is executed by the company, upon the

completion of the tunnel or subway and appurtenances and upon notification, the company shall remove and forever discontinue the use of that part of its elevated structure for which the tunnel or subway has been substituted, the expense of removing the same to be a part of the cost of the tunnel or subway; and in that event the damages sustained by the company above the benefit received are to be determined and paid.

Briefly summarized, the bill gives to the company an option within ninety days after the passage of the act to execute a contract for the sole and exclusive use of the proposed tunnel, with the alternative provisions that if such a contract is executed and the city votes to construct the tunnel, the elevated structure between the northerly end of the Washington Street tunnel and Sullivan Square shall be taken by the city and removed, the cost of removal to be charged to the cost of construction of the subway and adequate compensation for the taking paid to the company therefor, while if the contract is not executed and the city votes to construct the tunnel, the entire elevated structure of the company shall be removed by the company at its own expense and without compensation, as a menace to the public health and a detriment to the public welfare.

Spec. St. 1918, c. 159, gives to the trustees of the Boston Elevated Railway Company the authority to determine the character and extent of the service and facilities to be furnished, subject to the consent of the directors to the making of contracts for the operation or lease of subways, elevated or surface lines in addition to those then owned, leased or operated by the company, or any extensions thereof beyond their then limits, involving the payment of rental or other compensation by the company beyond the period of public operation. Assuming that the provision in this bill for securing the company's consent means consent by the officials authorized to act by Spec. St. 1918, c. 159, the provision that if the company shall not consent its entire elevated structure shall be removed without compensation would, in

my opinion, if enacted, be unconstitutional for two reasons: first, because it manifestly is included in an attempt to coerce the trustees and directors to make a contract for the use of the proposed tunnel, and would, therefore, be an impairment of the contract with the Commonwealth contained in said Spec. St. 1918, c. 159, and secondly, because it would be manifestly an arbitrary confiscation of the property of the company under the guise of legislation for the public welfare. Whether the company's elevated structure, erected under the authority and direction of the Legislature (St. 1894, c. 548, and amending acts), could be ordered to be removed without compensation to the company, under any circumstances, as an exercise of the police power, is, to say the least, doubtful. But an act containing a merely alternative provision for such removal as a penalty for failing to do some voluntary act would, on its face, show that the provision for removal was not passed as a matter of public necessity but in order to compel the doing of the voluntary act. For these reasons, as I have stated, the provisions of this bill which I have referred to are, in my judgment, plainly unconstitutional.

3. Petition for an amendment of the law providing for the public operation of the Boston Elevated Railway Company and establishing a five-cent fare on the lines of said company.

The bill accompanying this petition amends Spec. St. 1918, c. 159, by striking out provisions giving the trustees the right to regulate and fix fares, requiring them to establish a five-cent fare for a single continuous passage in the same general direction upon the roads owned, leased or operated by the company, and providing that the difference between the amount received from fares and the cost of service shall be paid by the Commonwealth. There is also an amendment to section 14 changing the method of apportionment of amounts assessed to cities and towns to meet any deficit. The bill provides that the act shall take

effect upon its acceptance by the Boston Elevated Railway Company before January 1, 1924.

The provisions of this bill, taking from the trustees the right to regulate and fix fares and establishing a five-cent fare, are clearly in derogation of the grant contained in Spec. St. 1918, c. 159, and the proposed act would therefore be unconstitutional unless the changes were accepted by the parties to the contract. The parties to the contract, other than the Commonwealth, are the Boston Elevated Railway Company and the West End Street Railway Company (see *Boston v. Treasurer and Receiver General*, 237 Mass. 403, 413). In his opinion to you (VI. Op. Atty. Gen. 396), my predecessor ruled, with reference to a bill to repeal Spec. St. 1918, c. 159, containing a provision that it should take effect upon its acceptance by the directors or a majority of the stockholders of the Boston Elevated Railway Company, that the proposed act would be unconstitutional because the directors could not exercise the power attempted to be conferred upon them to impair the obligation of Spec. St. 1918, c. 159, which had become a binding contract by acceptance of the stockholders of the two companies. In that opinion my predecessor expressly reserved the question whether, if the bill provided simply that the act should take effect upon its acceptance by a majority of the stockholders of the Boston Elevated Railway Company, it would be constitutional. That precise question is now before me for decision, understanding, as I do, that the provision that the act shall take effect "upon its acceptance by the Boston Elevated Railway Company" means its acceptance by the stockholders of that company.

Ordinarily the stockholders of a corporation by a majority vote may assent to an amendment or repeal of a statute constituting a contract between the State and their corporation. *Pennsylvania College Cases*, 13 Wall. 190; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574; Cf. *Durfee v. Old Colony, etc., R.R. Co.*, 5 Allen, 230. Applying this rule, if the Boston Elevated Railway Company were the sole party

to the contract with the Commonwealth the proposed act would, in my opinion, be constitutional. But the West End Street Railway Company was also a party to the contract, and if that corporation is now in existence, in my judgment, acceptance of the act by its stockholders should be provided for. Such provision was made in the Senate bill, affecting Spec. St. 1918, c. 159, considered by the court in *Opinion of the Justices*, 231 Mass. 603, 606, where the court gave their opinion that the bill, if enacted, would be constitutional, without, however, considering its effect on the contractual rights of the corporations concerned. I am informed that, under St. 1911, c. 740, the properties and franchises of the West End Street Railway Company have been conveyed to the Boston Elevated Railway Company, and preferred stock of the latter has been issued to the former in payment therefor, of which a large proportion has been distributed to its stockholders. Whether thereby a merger of the corporate franchise of the West End Street Railway Company has been effected, so that its identity has been destroyed, is a doubtful question about which I am not sufficiently advised as to the facts to express an opinion. See *Parkinson v. West End Street Ry. Co.*, 173 Mass. 446; *Whiting v. Malden & Melrose R.R. Co.*, 202 Mass. 298. If such a merger has taken place, acceptance by the stockholders of the Boston Elevated Railway Company is necessarily sufficient; but otherwise I think the stockholders of the West End Street Railway Company should also be given an opportunity to accept or reject the act.

The Boston Elevated Railway Company has different classes of stockholders. In the Senate bill considered and held constitutional in *Opinion of the Justices*, 231 Mass. 603, holders of the preferred stock issued under Spec. St. 1918, c. 159, § 5, were excluded from voting on the question of acceptance, but, as I have said, the court in their opinion did not consider the question whether the constitutional rights of the corporations were affected. I see no reason

why the right of stockholders to vote on the question of acceptance should be in any respect different from their right to vote generally as prescribed by the statutes and by-laws of the corporation.

My opinion, therefore, is that the bill, if enacted, would be constitutional if the West End Street Railway Company has, in fact, ceased to exist, but that otherwise it would not be constitutional unless provision were made for acceptance by the stockholders of that company.

4. Petition that the city of Boston be authorized to purchase or take by eminent domain the property and franchises of the Eastern Massachusetts Street Railway Company in the Hyde Park district of said city for the purpose of leasing the same to the Boston Elevated Railway Company.

The bill accompanying this petition authorizes the city of Boston, through its transit department, with the approval of the mayor, to purchase or take by eminent domain the whole or any portion of the street railway locations, tracks, poles, wires and other property used in connection therewith, owned by the Eastern Massachusetts Street Railway Company and located in Hyde Park, which, in its opinion, is necessary for the safe and efficient operation of street railways in that portion of Boston. It provides that before such purchase or taking the department shall, with the approval of the mayor, execute with the Boston Elevated Railway Company, in the name of the city, the company consenting thereto, a contract in writing for the sole and exclusive use of said property at an annual rental of four and one-half per cent of the net cost for an unspecified term of years. In order to be valid, as I have previously said, the consent of the company must be given by those officials who are authorized by Spec. St. 1918, c. 159, to determine whether the property should be leased.

There are provisions for the issuing of bonds and notes to be used in meeting damages, costs and expenses incurred in carrying out the provisions of the act. The bill does not expressly provide that compensation shall be paid to

the Eastern Massachusetts Street Railway Company for its property taken by eminent domain, and does not provide the method by which the amount of such compensation shall be determined. But it is not necessary that the proposed act shall expressly provide for payment of compensation or the method of determining this amount. The General Laws contain adequate provisions for payment of such compensation. G. L., c. 79, §§ 6, 12, 14, 45. The bill secures payment by the provision for an issue of bonds and notes outside the statutory limit of indebtedness, assuming that the amount of such issue, left undetermined in the bill, is adequate. These provisions would seem to be sufficient. *Brimmer v. Boston*, 102 Mass. 19, 23; *Bent v. Emery*, 173 Mass. 495, 498.

This bill raises the question of major importance whether the Eastern Massachusetts Street Railway Company can be taken by the Commonwealth or a political subdivision thereof for the purpose of leasing that property to the Boston Elevated Railway Company. As I have previously stated, property cannot be taken from one party holding it for a public use and given to another to hold in the same manner for precisely the same public use, since such a taking, effecting a mere change of control, cannot be founded on a public necessity. But the taking here proposed is of not precisely that sort. The use proposed to be made of the property is to lease it to the Boston Elevated Railway Company for some number of years, on terms to be agreed upon, which must, therefore, be such as the trustees and the directors of that company, under Spec. St. 1918, c. 159, have power to make. It should not be overlooked that the Commonwealth, in Spec. St. 1918, c. 188, § 19, has expressly reserved the right to take this property by eminent domain. The force of the argument in favor of the bill, I presume, is that the public will thereby receive the benefit of a unified transportation system with a unified control, and that in no other way can that desirable result be achieved. In view of these considerations,

in my opinion, the proposed act, if enacted, would be constitutional.

5. Petition for the creation of a Metropolitan Transportation District.

The bill accompanying this petition creates a metropolitan transportation district composed of the cities and towns of Arlington, Belmont, Boston, Brookline, Cambridge, Chelsea, Everett, Malden, Medford, Newton, Revere, Somerville and Watertown. It contains provisions for the management of the affairs of the district and provides for the purchase or taking of any or all street railway tracks, poles, wires, lands, property and appurtenances and any rights or interest therein, except the interest of the Boston Elevated Railway Company therein, owned, leased or operated in whole or in part by the Eastern Massachusetts Street Railway Company in East Boston, Charlestown, Everett, Chelsea, and in Revere and Malden with certain exceptions, after the execution of a contract for use as therein provided. It authorizes the execution with the Boston Elevated Railway Company of a contract in writing for the sole and exclusive use by that company of the street railway tracks and other property about to be taken, at a rental of five per cent of the net cost, the term ending with the termination of public operation of the company. It provides that the lines of transportation thus added to the railway system of the Boston Elevated Company shall be managed by the public trustees appointed under Spec. St. 1918, c. 159, as if a part of the system at the date of the passage of that act. It provides an adequate method for determination of damages caused by the taking, and makes the district liable for the amount thereof. It provides for payment by the issuing and selling of bonds of the district to a limit not specified, and provides that any deficit in income necessary to meet the principal and interest of such bonds and other expenses shall be apportioned by the Treasurer of the Commonwealth among the several cities

and towns included in the district and added to the amounts due from such cities and towns in the State tax next thereafter to be collected. There are other provisions giving powers and duties to the district and its officers which it is not necessary now to refer to.

The general nature of the scheme and system here laid out is similar to that of the bill last considered, and what I said there will apply here. I should, however, refer specifically to the provision that the lines of transportation added to the system of the Boston Elevated Railway Company by the provisions of the act shall be managed by the trustees as if a part of the system at the date of the passage of that act. No such obligation, of course, could be imposed upon the trustees without their consent, but the bill does not purport to impose any such obligation upon them without their consent, since the lease is to be made with the consent of the company for a term ending with the termination of public operation, and therefore cannot be made except by the trustees; and if the lease is made by them the privileges and obligations defined by the bill are precisely those under which the trustees would operate by virtue of Spec. St. 1918, c. 159. Therefore, in my judgment, this bill, if enacted into law, would be constitutional.

6. Petition that the Boston Elevated Railway Company be authorized to enlarge its terminal at Forest Hills in the West Roxbury district of the city of Boston.

The bill accompanying this petition purports to authorize the Boston Elevated Railway Company to enlarge its terminal at Forest Hills, and for that purpose to take property by eminent domain, whether privately or publicly owned, to borrow money and issue bonds and notes. It provides that takings and proceedings for compensation and other proceedings thereunder shall be in accordance with the provisions of St. 1921, c. 386. (VI Op. Atty. Gen. 410.) I see nothing in the proposed act repugnant to any constitutional provision.

7. Petition that the Boston Elevated Railway Company be required to keep in repair the portions of highways occupied by its tracks.

The bill here presented involves entirely different considerations and will be dealt with in a separate opinion.

8. Petition that provisions be made for improved transportation facilities between the cities of Boston and Revere.

The bill accompanying this petition empowers the Boston Elevated Railway Company to extend its transportation system and, with the approval of the Department of Public Utilities, after public hearing, to take by eminent domain, subject to the provisions of G. L., c. 79, or to acquire by purchase, street railway lines within the city of Revere, together with tracks, poles, wires and other structures and appliances connected therewith, all property so taken or acquired to be the property of the company and to be used and operated with and as part of its railway system and subject to the management and control provided by Spec. St. 1918, c. 159. The company is empowered, with the approval of the trustees, during the term of public operation, to issue stocks, bonds, notes and other evidences of indebtedness to provide funds for payment of properties taken or acquired under the provisions of the act, such securities to be subject to Spec. St. 1918, c. 159, § 6, so far as applicable.

What I have said concerning petitions numbered 4 and 5 is equally pertinent in the consideration of this bill, except that here the taking is not to be made by the Commonwealth or any political subdivision thereof, but by the Boston Elevated Railway Company, to which control of the property taken is transferred. I do not, however, believe that in order to be valid such a taking must be by the Commonwealth or some political subdivision thereof. Because of the legitimate public interest which may be served through unified control and ownership, the proposed act, if enacted, would be constitutional, in my opinion.

9. Petition for the acquisition and public operation by the city of Boston of street railway lines in the Hyde Park district of said city.

The bill accompanying this petition purports to create in the Hyde Park section of Boston a district for the purposes of street railway transportation, and to make the trustees of the Boston Elevated Railway Company, under Spec. St. 1918, c. 159, a corporation under the name of Hyde Park Transportation District, with all the powers of a street railway company organized under the General Laws. It purports to provide that certain lines named within that district shall be managed and operated by the corporation in behalf of the city of Boston as lines of the Boston Elevated Railway Company, subject to the provisions of Spec. St. 1918, c. 159. It further purports to provide that the Eastern Massachusetts Street Railway Company shall cease to operate said street railway lines and shall permit the corporation to take over and use the same and all property appurtenant thereto, with a provision that the corporation shall pay to the company an annual rental at the rate of five per cent on a sum equal to the value of the property taken. There are other provisions purporting to regulate rates of fare, and other provisions which need not now be referred to.

In my opinion, this bill is clearly unconstitutional, both because of additional powers and duties imposed upon the trustees of the Boston Elevated Railway Company in violation of the provisions of Spec. St. 1918, c. 159, and because the management and control of the Eastern Massachusetts Street Railway Company is taken from the trustees thereof in violation of the contract contained in Spec. St. 1918, c. 188. The bill does not indicate an intention that the property of the Eastern Massachusetts Street Railway Company shall be taken by an exercise of the power of eminent domain, and its provisions, in my opinion, cannot be so construed. But if the exercise of that power were intended by the bill, there is clearly no adequate provision for com-

pensation, since there is no provision for payment for the property taken, but only a provision for the payment of annual rental. *Attorney General v. Old Colony R.R. Co.*, 160 Mass. 62.

10. Petition relative to establishing a five-cent fare zone on street railway lines operated in the city of Lowell.

The bill accompanying this petition provides specifically that the rate of fare for a single passage on the lines of the Eastern Massachusetts Street Railway Company operating in the city of Lowell within the limits of travel of two miles from Kearney Square shall be five cents. Such a provision would be a direct impairment of the right given the trustees by Spec. St. 1918, c. 188, to regulate and fix fares on the lines of that company.

With respect to the nine bills which I have dealt with I have not attempted to scrutinize with particularity each one of them and point out every detailed feature which may be objectionable. Your inquiry not being directed to any specific feature of the bills, it is clear that it is impossible for me to foresee every question that might be raised or that your committee might have in mind. I have confined my attention to the fundamental questions of constitutional law involved in each bill which to me seem to merit consideration.

CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACT —
 REQUIREMENT THAT BOSTON ELEVATED RAILWAY
 COMPANY KEEP IN REPAIR PORTIONS OF HIGHWAYS
 OCCUPIED BY ITS TRACKS.

A statute requiring the Boston Elevated Railway Company to keep in repair the portions of highways occupied by its tracks, and exempting it from taxes imposed by G. L., c. 63, §§ 61-66, inclusive, would be constitutional.

On behalf of the committee on rules you have transmitted to me the petition of Edward W. Quinn, mayor of the city of Cambridge, and another, that the Boston Elevated Railway Company be required to keep in repair the portions of highways occupied by its tracks, and have asked my opinion as to the constitutionality of that measure.

To the
House of Rep-
resentatives.
1923
February 7.

The bill accompanying the petition is as follows: —

SECTION 1. During the period of public operation of the Boston Elevated Railway Company under the provisions of chapter one hundred and fifty-nine of the special acts of nineteen hundred and eighteen, and acts in amendment thereof, and supplementary thereto, the Boston Elevated Railway Company shall keep in repair, to the satisfaction of the superintendent of streets, street commissioner, road commissioners, or surveyors of highways, the paving, upper planking or other surface material of the portions of streets, roads and bridges occupied by its tracks; and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks, and shall be liable for any loss or injury that any person may sustain by reason of the carelessness, negligence or misconduct, of its agents and servants in the construction, management, and use of its tracks.

SECTION 2. When a party upon the trial of an action recovers damages of a city or town for an injury caused to his person or property by a defect in a street, highway, or bridge occupied by the tracks of said company, if said company is liable for such damages, and has had reasonable notice to defend the action, the city or town may recover of the said company, in addition to the damages, all costs of both plaintiff and defendant in the action.

SECTION 3. During the period of public operation of the Boston Elevated Railway Company under the provisions of chapter one hundred and fifty-nine of the special acts of nineteen hundred and eighteen, and acts in amendment thereof and supplementary thereto, said company

shall not be required to make the returns nor shall there be assessed upon or paid by it the taxes required by sections sixty-one to sixty-six, inclusive, of chapter sixty-three of the general laws.

Your question requires a somewhat extended analysis of the charter of the Boston Elevated Railway Company and certain amendments thereof, of statutes relating to the repair of highways occupied by street railway companies, and of decisions and opinions interpreting those statutes and their effect.

The Boston Elevated Railway Company was incorporated by St. 1894, c. 548. At the time of its incorporation P. S., c. 113, § 32, was in force, containing the following provision: —

Every street railway company shall keep in repair, to the satisfaction of the superintendent of streets, street commissioner, road commissioners, or surveyors of highways, the paving, upper planking, or other surface material of the portions of streets, roads, and bridges occupied by its tracks; and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks, and shall be liable for any loss or injury that any person may sustain by reason of the carelessness, neglect, or misconduct, of its agents and servants in the construction, management, and use of its tracks.

The charter of the Boston Elevated Railway Company was amended in many respects by St. 1897, c. 500. Section 10 of that statute contained the following provision: —

. . . During said period of twenty-five years no taxes or excises not at present in fact imposed upon street railways shall be imposed in respect of the lines owned, leased or operated by said corporation, other than such as may have been in fact imposed upon the lines hereafter leased or operated by it at the date of such operating contract or of such lease or agreement hereafter made therefor nor any other burden, duty or obligation which is not at the same time imposed by general law on all street railway companies; *provided, however*, that said corporation shall be annually assessed and shall pay taxes now or hereafter imposed by general law in the same manner as though it were a street railway company, and

shall, in addition, . . . pay to the Commonwealth, . . . during said period of twenty-five years, an annual sum, . . . (to be determined as therein provided).

The law requiring street railway companies to keep in repair portions of streets occupied by their tracks was materially changed in the following year by St. 1898, c. 578. Section 1 excepted from the operation of the act the Boston Elevated Railway Company and companies whose railways were then leased or operated by said company. Sections 6 to 10, inclusive, imposed upon street railway companies an additional excise tax for the benefit of cities and towns in which such companies were operating, to be applied to the construction, repair and maintenance of the public ways and the removal of snow therefrom. Section 11 contained the provision that "street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, but they shall remain subject to all legal obligations imposed in original grants of locations"; and this provision appears in substantially the same form in R. L., c. 112, § 44, and G. L., c. 161, § 89. By section 26, P. S., c. 113, § 32, was repealed, subject to the exception contained in section 28. Section 28 provided, in part, that "for the term of twenty-five years from the tenth day of June in the year eighteen hundred and ninety-seven this act shall not apply to or affect the Boston Elevated Railway Company or any railways now owned, leased, or operated by it, . . . and the acts and parts of acts repealed by section twenty-six hereof shall continue during said term in full force so far as they relate thereto."

The constitutionality of St. 1898, c. 578, § 11, was questioned and sustained in *Springfield v. Springfield St. Ry. Co.*, 182 Mass. 41, and *Worcester v. Worcester, etc., St. Ry. Co.*, 182 Mass. 49, and the decision in the latter case was affirmed on a writ of error by the Supreme Court of the United States in *Worcester v. St. Ry. Co.*, 196 U. S. 539. In those cases the question raised by the respective cities was whether

the statute, in so far as it abrogated conditions in grants of location not original, violated the constitutional provision against impairing the obligation of contracts. In the Springfield case the court held that the locations did not constitute contracts, or, if they did, that they were of such a nature that the Legislature could modify or annul them without thereby violating the constitutional provision; that they were analogous to licenses to run omnibuses and conveyed no exclusive rights in the highways or streets in which they were granted. In the Worcester case the court pointed out that the imposition of an obligation in the charters of street railways or the general laws to keep in repair some small portions of the streets and bridges occupied by their tracks and other obligations in the guise of restrictions upon grants of locations, was a method of compelling the companies to contribute to the burden imposed upon municipalities with respect to roads and bridges, in the nature of indirect taxes, and that St. 1898, c. 578, was enacted for the purpose of freeing the companies, at least to a considerable extent, from such indirect obligations and imposing certain new taxes, of which the municipalities were given the benefit. The Supreme Court of the United States on writ of error sustained this decision, on the ground that the city had no proprietary right in the property of the defendant or to demand the continuance of an obligation to pave and repair the streets, that the city was merely a political subdivision of the state, and that the rights in question were not private property beyond legislative control.

The effect of St. 1898, c. 578, by its terms (§§ 1 and 28), was to leave the Boston Elevated Railway Company under the same duty with regard to the repair of streets that existed prior thereto, and this obligation continued by virtue of the exception in section 28 until June 10, 1922. On the other hand, of course, it was not required to pay the new taxes imposed by sections 6 to 10, inclusive, of the act. There is a serious question whether this exception of the Boston Elevated Railway Company from the operation of

the act did not make the whole statute unconstitutional. The question is of a nature that makes a positive answer difficult. A statute requiring street railway companies to carry pupils of the public schools to and from school at reduced rates, and excepting the Boston Elevated Railway Company from its provisions, was held constitutional in *Commonwealth v. Interstate Consolidated St. Ry. Co.*, 187 Mass. 436. The court there pointed out that the situation of the lines of the Boston Elevated Railway Company in the midst of a dense population was so different from that of other lines in the State that it might properly call for an exemption from the law established for others. See also *Commonwealth v. Boston & Northern St. Ry. Co.*, 212 Mass. 82. The same consideration may lead to the conclusion that there might properly be a special reason for continuing to impose a duty on the company to keep in repair portions of streets and bridges occupied by their tracks. I cannot say, therefore, that St. 1898, c. 578, was unconstitutional because the Boston Elevated Railway Company was excepted from its operation.

There is a further question whether St. 1898, c. 578, was in violation of any right created by St. 1897, c. 500, § 10. Two of my predecessors held that section 10 constituted a contract between the Commonwealth and the Boston Elevated Railway Company. II Op. Atty. Gen. 261, 426. If so, it might well have been questioned whether the provision in that section, that during the period of twenty-five years no burden, duty or obligation other than taxes or excises should be imposed on the Boston Elevated Railway Company which was not at the same time imposed by general law on all street railway companies, did not have the effect of making the provisions of St. 1898, c. 578, § 11, applicable to the Boston Elevated Railway Company, notwithstanding the provisions of sections 1 and 28 excepting the Boston Elevated Railway Company from the operation of that statute. But I am informed that no such contention was made and that, in fact, the obligations of the previous

law were always applied to and performed by the Boston Elevated Railway Company. St. 1897, c. 500, § 10, was expressly repealed by Spec. St. 1918, c. 159, § 17, so that this possible constitutional question was thereby removed.

We come now directly to the question whether the proposed act would be unconstitutional.

Certainly it violates no rights given or protected by Spec. St. 1918, c. 159. There is no provision in that statute affecting to the slightest extent the right of the Commonwealth to impose any obligation on, or to change any obligation of, the company with respect to the repair of streets or the payment of taxes. Indeed, section 2 provides that "nothing herein contained shall be held to affect the right of the commonwealth or any subdivision thereof to tax the company or its stockholders in the same manner and to the same extent as if the company had continued to manage and operate its own property."

The effect of section 1 of the proposed act is merely to continue the obligations of the Boston Elevated Railway Company imposed by P. S., c. 113, § 32, for the period of public operation under Spec. St. 1918, c. 159, as they were during the period of twenty-five years from June 10, 1897, by virtue of the excepting provision in St. 1898, c. 578, § 28. In my judgment, therefore, section 1 of the proposed act would be constitutional, if enacted.

Section 3 of the proposed act, providing that during the period of public operation the company shall not be required to make the returns and shall not have assessed upon it the taxes imposed by G. L., c. 63, §§ 61-66, exempts the company from payment of the excise tax imposed by those sections. This excise tax is the same tax which was first imposed by St. 1898, c. 578, §§ 6-10. The effect of this section, therefore, is merely to except the company from the burdens as well as the benefits of the law first appearing in St. 1898, c. 578. If section 1 of the proposed act is constitutional, in my judgment, section 3 also would be clearly constitutional.

The provisions of section 2 are similar to those contained in P. S., c. 113, § 33. I see nothing unconstitutional in those provisions.

PHARMACIST — NARCOTIC DRUGS — PRESCRIPTIONS —
COPIES — EVIDENCE.

Under G. L., c. 94, § 198, a prescription for narcotic drugs, when filled, must be retained on file for at least two years by the druggist filling it, and no copy of such prescription shall be made except for the purpose of record by said druggist.

It follows that a druggist cannot be summoned to appear before a court and ordered to bring with him the original prescription for narcotic drugs; but since the prescription and the druggist's record are required by statute to be open at all times to inspection by the officers of the Department of Public Health, the Board of Registration in Pharmacy, the Board of Registration in Medicine, authorized agents of said department and boards, and by the police authorities and police officers of towns and cities, the statements and items contained therein may be shown by the testimony of any observer thereof.

You request my opinion on the following questions: —

1. May a copy of a prescription or the original prescription for a narcotic drug be taken from the files of a retail pharmacy by any of the authorities specified in G. L., c. 94, § 198, for purposes of evidence in the prosecution of a violator of the provisions of this chapter, in so far as it relates to narcotic drugs?

2. May a druggist be permitted or required, under said section 198, to make a copy of a prescription for narcotic drugs, filled by him in the course of his business, and give the copy to any of the authorities specified in said section, at their request, for purposes of evidence?

3. May a druggist who has in his possession a prescription for narcotic drugs which has been filled by him in the course of his business, be summoned to appear before a court and ordered to bring with him the original prescription for narcotic drugs, which, according to said section 198, "shall be retained on file for at least two years by the druggist filling it?"

The sale and distribution of narcotic drugs are governed by the provisions of G. L., c. 94, §§ 197–217, inclusive. The law pertaining to your question is contained in section 198, the material portion of which is as follows: —

The prescription, when filled, shall show the date of filling and the legal signature of the person filling it, written across the face of the pre-

To the Com-
missioner of
Civil Service.
1923
February 7.

scription, together with the legal signature of the person receiving such drug, and the prescription shall be retained on file for at least two years by the druggist filling it. No prescription shall be filled except in the manner indicated therein and at the time when it is received, and the full quantity of each substance prescribed shall be given. No order or prescription shall be either received for filling or filled more than five days after its date of issue as indicated thereon. Each pharmacist who fills a prescription for a narcotic drug shall securely attach to the container thereof a label giving the name and address of the store where the prescription is filled, the date of filling, the name of the person for whom it is prescribed, the name of the physician, dentist or veterinarian who issued it; and the narcotic drug so delivered shall always be kept in its container until used. No prescription shall be refilled, nor shall a copy of the same be made except for the purpose of record by the druggist filling the same, such record to be open at all times to inspection by the officers of the department of public health, the board of registration in pharmacy, the board of registration in medicine, authorized agents of said department and boards, and by the police authorities and police officers of towns.

This statute is explicit, and in view of the express prohibition contained therein I am of the opinion that no copy of a prescription therein specified can properly be made and used for the purpose outlined in your first and second questions, and I accordingly answer them in the negative.

Your third question presents other considerations, depending upon whether or not the druggist in question is a defendant or a witness in a case where another person is defendant. In the former instance, he could not be obliged to furnish evidence tending to incriminate him. The general rule as to production of documents may be stated thus (I Greenleaf on Evidence, 14th ed., § 560):—

When the instrument or writing is in the hands or power of the adverse party, there are, in general, no means at law of compelling him to produce it; but the practice, in such cases, is, to give him or his attorney a regular "notice to produce" the original. Not that, on proof of such notice, he is compellable to give evidence against himself, but to lay foundation for the introduction of secondary evidence of the contents of the document or writing, by showing that the party has done all in his power to produce the original.

See also Wigmore on Evidence, §§ 1199-1210.

On the other hand, if a party is summoned as a witness in an action against another person and it is desired to have the witness produce certain documents, the procedure is to issue a subpoena *duces tecum* directed to the person who has them in his possession. See I Greenleaf on Evidence, 14th ed., § 559; Wigmore on Evidence, §§ 1211, 1213.

But in the case stated by your inquiry the statute expressly provides that said prescription "shall be retained on file for at least two years by the druggist filling it," and expressly prescribes and restricts the use of the same. It is therefore possible that the druggist is, by reason of a privilege, legally not compellable to produce the prescription, which would be clearly an excuse for non-production.

In this connection the decision in the case of *Commonwealth v. Stevens*, 155 Mass. 291, is significant. Like the case under consideration, that case involved the production of the register required by law to be kept by a druggist, in which entries of sales of intoxicating liquors were required to be made. In that case the court says:—

The rule that requires the production of the best evidence readily obtainable is an important one. Where the contents of a book or written document are needed in evidence, the book or writing should be produced, when there is no good reason for the non-production of it; and if in the present case the presiding justice had excluded the evidence, unless the defendant had failed to produce the book on notice, we cannot say that his ruling would have been erroneous.

On the other hand, this was not an ordinary writing or a public record. It was a register required by the statute to be kept as a part of the business done by the defendant under his license. St. 1887, c. 431, § 3. Its form is prescribed by the statute. The pages are to be divided into eight columns, each column with a prescribed heading, under which the entries are to be made showing the required particulars in regard to each sale. These particulars must be entered at the time of every sale. The statute contemplates that this book shall all the time be kept at the store of the apothecary, and provides that it shall at all times be open to the inspection of certain officers mentioned. The witness was one of these officers, and he was allowed to testify to the number of entries of sales within a specified time. Neither the witness nor any other of the officers of the

Commonwealth had a right to take the book from the defendant and bring it to the court, and there would be some force in a suggestion that a notice to the defendant to produce it to be used in evidence would have been inconsistent with a proper regard for his duty to keep it where entries of sales might immediately be made in it, so long as he continued to do business under his license. The particulars of the entries in regard to the sales were not offered in evidence, and the precise words written in the register were not in question. It has been held that the language of a license hanging on the wall of a liquor dealer's shop may be testified to orally. *Commonwealth v. Brown*, 124 Mass. 318. This decision does not cover the case at bar; but there is some ground for contending that the number of sales found recorded in the register should be considered as a fact in the mode of conducting the defendant's business, to be observed by a police officer in the performance of his duty of inspecting the register, and to be testified to like any other material fact apparent to an observer. Such evidence was received without objection in *Commonwealth v. Perry*, 148 Mass. 160. We are not convinced that there was such error in this particular as to entitle the defendant to a new trial.

I am accordingly constrained to advise you that in either case, namely, whether the druggist be a defendant or a witness, he cannot be "summoned to appear before a court and ordered to bring with him the original prescription for narcotic drugs"; but since the prescription and the druggist's record are required by statute to be open at all times to inspection by the officers of the Department of Public Health, the Board of Registration in Pharmacy, the Board of Registration in Medicine, authorized agents of said department and boards, and by the police authorities and police officers of towns and cities, the statements and items contained therein may be shown by the testimony of any observer thereof, which might well be the best evidence readily obtainable.

CIVIL SERVICE — PROMOTION — PROBATIONARY PERIOD.

The rule providing that no person "shall be regarded as holding office or employment in the classified public service until he has served a probationary period of six months," does not apply in the case of promotion from one grade of the classified civil service to the next grade.

You request my opinion as to whether section 1 of Civil Service Rule 18 applies in the case of promotion from one grade of the classified civil service to the next grade. I assume that you are referring to the case of a person who is in the classified public service.

To the Com-
missioner of
Civil Service.
1923
February 8.
—

Section 1 provides:—

No person appointed in the official or labor division shall be regarded as holding office or employment in the classified public service until he has served a probationary period of six months.

This rule is made under the provisions of G. L., c. 31, § 3, which reads, in part, as follows:—

The board shall, subject to the approval of the governor and council, from time to time make rules and regulations . . . Such rules . . . shall include provisions for the following:

(e) A period of probation before an appointment or employment is made permanent; . . .

One of the purposes of the Civil Service Act is to ensure tenure of office for an employee who has satisfactorily passed his period of probation. If, under section 1 of Civil Service Rule 18, a person in the classified public service lost his status as a civil service employee upon promotion to the next grade, and again became a probationer, the rule would not afford the protection of permanent employment contemplated by the statute. Under such a construction a civil service employee could accept a promotion only at the cost of his civil service standing, and the appointing officer could rid himself of any employee in the classified public service by the simple device of first promoting him, thus making him a probationer, and then discharging him.

Neither the statute nor the rule intends such result. The statute, as well as the rules made thereunder, distinguishes between an "appointment" and a "promotion." See G. L., c. 31, §§ 3 and 18; Civil Service Rules 18 and 28; *McDonald v. Fire Engineers of Clinton*, 242 Mass. 587.

I am therefore of the opinion that section 1 of Civil Service Rule 18 does not apply to persons who are holding office or employment in the classified public service and are promoted from one grade of the classified civil service to the next grade. The case of *McDonald v. Fire Engineers of Clinton*, *supra*, which involved the status of a call fireman appointed to the permanent force, has no bearing on this question.

LISTING BOARD OF THE CITY OF BOSTON — CITY
DEPARTMENT.

The listing board of the city of Boston is not a city department, and is not subject to the ordinances of that city relative to printing and office supplies.

To the Police
Commissioner
of Boston.
1923
February 12.

You request my opinion on certain questions of law having to do with the listing board of the city of Boston, created by Gen. St. 1917, c. 29, § 7.

You ask, first, as to whether or not the said listing board is obliged to have all its printing and stationery supplied by the printing department of the city of Boston or whether outside bids for the same can be called for. You ask, second, as to whether the said listing board may legally contract for other supplies without advertising for the same in accordance with the provisions of the city charter governing department heads, as found in St. 1909, c. 486, § 30.

In your communication you call my attention to section 1 of chapter 26 of the Revised Ordinances of the City of Boston, which provides that the printing department of the city of Boston shall supply all printing, stationery and office supplies used by any board, commission or department for which the said city is required by law to furnish

such supplies; and to section 16 of chapter 3 of said Ordinances, which provides that every officer in charge of a department requiring any printing, binding, stationery or other office supplies shall obtain the same from the said superintendent of printing, by requisition, on blanks to be prepared by the superintendent.

The answer to both your questions depends upon whether the listing board is a "department," within the meaning of the statute and of the ordinances above quoted.

The listing board is a board established by Gen. St. 1917, c. 29, § 7, which reads as follows:—

In Boston there shall be a listing board composed of the police commissioner of the city and one member of the board of election commissioners, who shall annually be appointed by the mayor, without confirmation by the city council, for the term of one year and who shall belong to that one of the two leading political parties of which the police commissioner is not a member. In case of disagreement between the two members of said board, the chief justice of the municipal court of the city of Boston, or, in case of his disability, the senior justice of said court who is not disabled, shall, for the purpose of settling such disagreement, be a member of said board and shall preside and cast the deciding vote in case of a tie.

No authority is given to the city to review its action or to add to or subtract from the powers and duties of the listing board. Section 1 of chapter 2 of the Revised Ordinances provides that "the mayor shall appoint heads of *departments* and members of municipal boards and fill vacancies therein in the manner provided by statute." It would seem that the departments contemplated by the other sections of the Revised Ordinances, to which you refer, are those which come within the purview of section 1 of chapter 2 of the Ordinances, and, obviously, the listing board does not.

Furthermore, this is a board created by statute, of which the Police Commissioner for the City of Boston is one member. As he is a State official, the city government cannot impose on him duties in addition to those imposed

by the acts creating his office, and acts in addition to and in amendment thereof. V Op. Atty. Gen. 394. The fact that the mayor has the power of appointment, within a very restricted field, of one member of the board has no significance. *Mahoney v. Boston*, 171 Mass. 427, 429.

The same construction must of necessity be given to the word "department" in St. 1909, c. 486, § 30. The listing board, as established, is not a department of the city nor one of its governing boards. *Phillips v. Boston*, 150 Mass. 491, 494. I therefore advise you that the listing board does not come within the provisions of that statute nor within the provisions of section 1 of chapter 26 or of section 16 of chapter 3 of the Revised Ordinances of the City of Boston.

INCOME TAX ACT — INTERPRETATION.

G. L., c. 62, § 1 (a), Third, excepting from the income tax interest from "loans secured exclusively by mortgage of real estate, taxable as real estate, situated in the commonwealth," should be construed as providing for the exemption of interest from loans secured by mortgage exclusively of real estate, taxable as real estate, situated in the Commonwealth.

Interest from a mortgage note, or an issue of mortgage bonds, endorsed by another person and secured by a mortgage of real estate situated and taxed in Massachusetts, is exempt from taxation by virtue of G. L., c. 62, § 1 (a), Third.

You ask my opinion as to the proper interpretation of G. L., c. 62, § 1, subsection (a), cl. Third. The material portion of said section 1 is as follows:—

SECTION 1. Income of the classes described in subsections (a), (b), (c) and (e) received by any inhabitant of the commonwealth during the preceding calendar year, shall be taxed at the rate of six per cent per annum.

(a) Interest from bonds, notes, money at interest and all debts due the person to be taxed, except from:

Third, Loans secured exclusively by mortgage of real estate, taxable as real estate, situated in the commonwealth, to an amount not exceeding the assessed value of the mortgaged real estate less the amount of all prior mortgages.

You state the cases of a mortgage note and of an issue of mortgage bonds, each secured by real estate situated and

taxed in Massachusetts to an amount greater than the face of the mortgage plus all prior mortgages, but with the addition of an endorsement of another person on the mortgage note or mortgage bonds. You ask whether the fact of such endorsement takes the interest out of the exempted class for the reason that the loan is not then secured "exclusively by mortgage of real estate."

As a general proposition, the term "securities" embraces promissory notes. *Griggs v. Moors*, 168 Mass. 354, 361; *Jennings v. Davis*, 31 Conn. 134; *Wagner v. Scherer*, 89 N. Y. App. Div. 202. Broadly speaking, the obligation of another person may be security for a loan, and such obligation may be created or evidenced as well by endorsement of a note given by the person to whom the loan is made as by the furnishing of a separate promissory note. On the other hand, when we speak of a "secured note" we generally mean a note with collateral security, and the endorsement of a note by a third person is not collateral security for the note. Cf. *Boston Railroad Holding Co. v. Commonwealth*, 215 Mass. 493, 497.

In order to determine the meaning of the words used in G. L., c. 62, § 1, (a), Third, reference must be made to the statutes as they existed prior to the enactment of the income tax law as well as to other parts of the present tax laws.

By St. 1881, c. 304, §§ 1-3, provision was made for taxing separately as real estate the interest of a mortgagee, and by section 6 of the same statute "loans on mortgages of real estate, taxable as real estate," except the excess of such loans above the assessed value of the mortgaged real estate, were exempted from taxation. The chapter is entitled "An Act relieving property from double taxation in certain cases," and the object of the statute was to avoid double taxation in the cases to which it applied. See *Knight v. Boston*, 159 Mass. 551. The statute was construed to apply only to cases where the mortgaged security was wholly real estate situated wholly in Massachusetts. *Brooks*

v. *West Springfield*, 193 Mass. 190, 194. In that case the court held that a mortgage which included, besides real estate in the Commonwealth, real estate in other States and also personal property, did not come within the terms of the statute, since the statute granted an exemption only in cases where all the security was taxable as real estate in Massachusetts, and on provision was made for apportionment when only a part of the security was so taxable.

Re-enactments of St. 1881, c. 304, §§ 1-3 and 6, appear in P. S., c. 11, §§ 14-16 and 4, R. L., c. 12, §§ 16-18 and 4, St. 1909, c. 490, pt. I, §§ 16-18 and 4, and G. L., c. 59, §§ 12-14 and 4, respectively.

The income tax law of 1916 (Gen. St. 1916, c. 269) contained in section 2 (a), Third, the exemption which is substantially re-enacted in G. L., c. 62, § 1 (a), Third. It made a change in the previous law, the result of which was that in cases where interest was not taxable loans were exempt from taxation, as before, if they were secured by mortgage of real estate, taxable as real estate, within the interpretation of those words as given in *Brooks v. West Springfield*, while in cases where the interest was taxable the exemption was governed by the provision of the clause under consideration. The purpose of this clause clearly was to continue and make applicable to interest from loans the same exemption of which the loans themselves had previously had the benefit. In passing, it should be noted that in the report of the special commission appointed by Res. 1915, c. 134, the clause read, — "3. Loans on mortgages of taxable real estate situated within this commonwealth to an amount not exceeding the assessed value of the mortgaged real estate," and that in the report of the House Committee on Taxation (House Document, No. 2073) the clause was changed to read, — "Third: Loans secured exclusively by mortgages of real estate, taxable as real estate, situated within the commonwealth, to an amount not exceeding the assessed value of the mortgaged real estate."

Under the provision exempting from taxation loans secured

by mortgage of real estate, taxable as real estate, it was held in *Brooks v. West Springfield*, as stated above, that the mortgaged property must consist of real estate exclusively, and that the real estate must lie wholly in the Commonwealth. The ground of the decision was that the statute in terms applied only to domestic real estate, and that the Legislature had not provided for an apportionment when other property was included in the mortgage. The words "loan on mortgage of real estate, taxable as real estate" are readily susceptible of the interpretation that the mortgaged property shall consist of real estate alone, and that it must be taxable as such in Massachusetts, but they do not justify a construction which would make them inapplicable to loans on mortgages exclusively of Massachusetts real estate, where the mortgage note is endorsed by a third person, and there is no suggestion in *Brooks v. West Springfield* or any other case that such an implication should be made. To exclude such loans from the exemption would be to impose double taxation in the very cases which the statute was intended to provide for.

The provision in G. L., c. 62, § 1 (a), Third, was evidently, as I have said, made for the purpose of giving an exemption to interest on loans co-extensive with the exemption previously given to the loans themselves. It is reasonable to suppose that the changes in language by the insertion of the word "exclusively" and the addition of the words "situated in the commonwealth" were for the purpose of expressing in the statute the result of the decision in *Brooks v. West Springfield*, the word "exclusively" being intended to exclude cases where the mortgage covered other property as well as real estate, and the phrase "situated in the commonwealth" to confine the exemption to cases where the real estate was wholly in Massachusetts. In other words, it seems probable that what the Legislature intended would be more precisely expressed by changing the location of the word "exclusively" so that the phrase would be "loans secured by mortgage exclusively of real estate, taxable as

real estate, situated in the commonwealth," etc. In view of the manifest purpose for which the statute was passed, it is my opinion that the clause should be construed in the way which I have indicated, and that each of the two cases you have stated comes within the exemption.

CONSTITUTIONAL LAW — ATTORNEY GENERAL — MEMBER OF THE BAR.

The office of attorney general is recognized by, and provided for in, the Constitution. It is not within the province of the Legislature to add to or subtract from the qualifications for the office of attorney general required by the Constitution. The qualifications for the office of attorney general established by the Constitution need not be established by express provision; they may be implied. The Constitution contains the implied qualification that the attorney general shall be a member of the bar. The Legislature may pass an act which merely expresses what in the Constitution is implied.

To the Joint
Committee on
the Judiciary.
1923
February 15.

You request my opinion whether it is within the province of the Legislature to pass a law requiring the attorney general to be a member of the bar, or whether an amendment to the Constitution would be necessary to bring about that result.

The office of attorney general was not created by the Constitution. The first appointment of an attorney general in Massachusetts was in 1680. The office was recognized as already in existence by I Prov. Laws, 1693-4, c. 3, § 12. The office was recognized by c. II, § I, art. IX, of the Constitution as originally adopted in 1780. By Mass. Const. Amend. XVII it was provided that the attorney general, with other State officers, should be elected annually (now biennially by Mass. Const. Amend. LXIV). Mass. Const. Amend. XVII contains the following provision with respect to qualification:—

No person shall be eligible to either of said offices unless he shall have been an inhabitant of this commonwealth five years next preceding his election or appointment.

By that amendment the tenure of the office is secured and its terms defined. At least since the adoption of Mass. Const. Amend. XVII, therefore, the office of attorney general is an office provided for in the Constitution, whose tenure, mode of election and qualifications are prescribed by the Constitution.

Where the tenure, the mode of election or appointment, and qualifications of an office are prescribed by the Constitution, the Legislature cannot change them unless the Constitution gives the Legislature authority to do so. *Taft v. Adams*, 3 Gray, 126, 130; *Kinneen v. Wells*, 144 Mass. 497; *Graham v. Roberts*, 200 Mass. 152, 157; *Attorney General v. Tufts*, 239 Mass. 458, 480; *Attorney General v. Pelletier*, 240 Mass. 264; *Opinion of the Justices*, 165 Mass. 599, 601; *Opinion of the Justices*, 240 Mass. 611, 614.

The Constitution does not give the Legislature authority to make such changes with respect to the office of attorney general. Since 1780 the powers and duties of the office have been declared and defined to some extent by statute (see G. L., c. 12, §§ 1-11). But the authority so to act is not to be confused with authority to make changes in the qualifications for office.

Article IX of the Declaration of Rights provides:—

All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

This article in substance declares that the right of electors and of persons to be elected for public office shall be limited only by such qualifications as are prescribed in the Constitution. *Brown v. Russell*, 166 Mass. 14, 21; *Opinion of the Justices*, 160 Mass. 586. It applies to the office of attorney general, since the qualifications of that office are established by the frame of government.

I am therefore of the opinion that it is not within the province of the Legislature to pass any law which would

add to or subtract from the qualifications for the office of attorney general required by the Constitution.

It is necessary now to consider whether the Constitution requires that the attorney general shall be a member of the bar.

Qualifications for office established by the Constitution need not be established by express provision; they may be implied. Striking instances of such implication are found in *Opinion of the Justices*, 107 Mass. 604, and *Opinion of the Justices*, 165 Mass. 599, where the court held, regarding justices of the peace and notaries public, respectively, that the Constitution implied a qualification that the incumbent be a man, and precluded the appointment of a woman to the office.

In the former case the justices said:—

By the Constitution of the Commonwealth, the office of justice of the peace is a judicial office and must be exercised by the officer in person, and a woman, whether married or unmarried, cannot be appointed to such an office. The law of Massachusetts at the time of the adoption of the Constitution, the whole frame and purport of the instrument itself, and the universal understanding and unbroken practical construction for the greater part of a century afterwards, all support this conclusion, and are inconsistent with any other. It follows that, if a woman should be formally appointed and commissioned as a justice of the peace, she would have no constitutional or legal authority to exercise any of the functions appertaining to that office.

In the latter case the court gave the opinion that it was not within the constitutional power of the Legislature to authorize the appointment of women as notaries public. In the course of the opinion the justices said:—

The Constitution did not create the office of notary public. It was an office known to the Roman law, and has existed in all or nearly all Christian countries for many centuries. The duties of the office in this Commonwealth are in part prescribed by statute, and in part are such as by usage notaries public for a long time have been accustomed to perform, and the international character and relations of notaries public are important. . . .

. . . The question in every case is of the meaning of the Constitution, and in determining this, the history and nature of the particular office and the usages of this and other States and countries with regard to the office at the time of the adoption of the Constitution must be considered. . . .

Where an office is created by statute, the tenure, the mode of appointment, the qualifications required, the duties of the office, and the compensation, are wholly within the control of the Legislature, unless there is some limitation put upon the Legislature by the Constitution; and the statute creating the office may be altered or repealed by the Legislature at any time. But if the tenure of an office and the mode of appointment are prescribed by the Constitution, the Legislature cannot change them, unless the Constitution gives the Legislature authority to do so. If the qualifications for the office are prescribed by the Constitution, the Legislature cannot change them. If the qualifications are not prescribed by the Constitution, although the tenure and mode of appointment are, there has been some question whether the Legislature can prescribe the qualifications, but the solution of this question in any particular case depends upon the construction of the particular clauses of the Constitution involved, as well as of the whole frame and purport of the Constitution. . . .

. . . It was the nature of the office of justice of the peace, and the usage that always had prevailed in making appointments to that office, that led the Justices to advise that it could not have been the intention of the Constitution that women should be appointed justices of the peace. 107 Mass. 604. In our opinion, the same considerations apply to the office of notary public.

The same considerations apply even more strongly to the question you have submitted, as will appear from an examination of the history and nature of the offices of attorney and attorney general, in Massachusetts and elsewhere, and the usages with regard to them in 1780.

Charles Warren, in his "History of the American Bar," gives the following information as to the development and significance of the title of "attorney" in Massachusetts during the colonial period.

As early as 1649 there existed "attorneys" of some kind in the Massachusetts Bay Colony, for they are mentioned in the records of the General Court for that year. They probably appeared by special powers.

In 1686 the Superior Court was created under the new

Governor, Sir Edmund Andros, and attorneys were obliged, upon admission to the bar, to take oath.

In 1701 the practice of the law became first dignified as a regular profession through the requirement by statute of an oath for all attorneys admitted by the courts. By this oath, since the time of Lord Holt, the attorney was pledged to conduct himself "in the office of an attorney within the courts" according to the best of his knowledge and discretion, and with all good fidelity, as well to the courts as to his clients. *Robinson's Case*, 131 Mass. 376, 379.

At first no special qualifications and no definite term of study appear to have been required for admission to the bar; but in 1761 the bar prescribed a term of seven years' probation — three of preliminary study, two of practice as attorney in the Inferior Court, and two of practice as attorney in the Superior Court.

In 1781 the first order relating to lawyers, made by the court after Massachusetts became a State, dealt with the method of creating barristers from among the practicing attorneys.

In 1806 the Supreme Judicial Court adopted the following rule:

Ordered — First, no attorney shall do the business of a counsellor unless he shall have been made or admitted as such by the Court.

Second, all attorneys of this Court who have been admitted three years before the sitting of this Court shall be and hereby are made counsellors and are entitled to all the rights and privileges of such.

Third, no attorney or counsellor shall hereafter be admitted without a previous examination.

In short, at the time of the use of the term "attorney general" in the Constitution of Massachusetts, in 1780, the word "attorney" had come to have a specific and well-recognized meaning. Whether we examine the history of England or that of our own colonial period, we find that the word signified a man entitled to engage in the practice of law before the courts — in other words, a "member of the

bar"; and that admission to the bar, for a long time prior to 1780, entailed a formal presentation of the candidate, the administering of an oath, and compliance with certain educational requirements.

Likewise by 1780 the phrase "attorney general" had come to designate the incumbent of a public office which possessed well-recognized characteristics. The office of attorney general is of ancient origin, and its powers and duties were defined and prescribed by the common law. *Commonwealth v. Kozlowsky*, 238 Mass. 379, 385; *State v. Ehrlick*, 65 W. Va. 700, 702. In England the attorney general was the chief legal representative of the crown, and the official head of the bar. 3 Bl. Com. 26, 27; 13 Ill. Law Rev. 602. In Massachusetts, in colonial times, the attorney general was the chief law officer of the province, and his powers and duties were largely such as attached to it at common law. *Commonwealth v. Kozlowsky*, 238 Mass. 379, 385, 386; VI Op. Atty. Gen. 138. So far as it has been possible to ascertain, every provincial attorney general, from Anthony Checkley in 1680 to Robert Treat Paine, the last of the provincial attorneys general, appears to have been, prior to his elevation to that office, an "attorney" qualified to practice in the provincial courts.

The phrase "attorney general" in Mass. Const., c. II, § I, art. IX, must be taken to have been used in its natural, long-established sense; and to include within itself those same incidents, characteristics and qualifications which the phrase imported at common law.

This construction is supported not only by history and usage, but by direct implication from the use of the word "attorney" in the title of the office. The attorney general, as the name of his office implies, is the chief law officer of the Commonwealth. VI Op. Atty. Gen. 138; *Dearborn v. Ames*, 8 Gray, 1, 15; *State v. Robinson*, 101 Minn. 277, 288. The qualification that he should be a member of the bar is inherent in the office and required by the duties which he has to perform.

In *Opinion of the Justices*, 240 Mass. 611, 614, the court stated their opinion that a bill providing that the several district attorneys should be members of the bar of the Commonwealth, if enacted, would be constitutional. This opinion contains a strong intimation, applicable as well to the office of attorney general, that the use of the word "attorney" in the title of the office establishes an implied qualification that the incumbent must be a member of the bar. On this point the court said:—

There is a considerable body of authority which holds that the use of the word "attorney" in the title of the office carries with it the meaning that the incumbent must be a member of the bar. It has been said that "To be a district *attorney*, he must be a lawyer. He is not an attorney in fact. He must be an attorney at law. The name of the officer implies it. He is the attorney of the state in a certain *district*, to distinguish him from an attorney *general*." *State v. Russell*, 83 Wis. 330, 332, 333. *People v. May*, 3 Mich. 598. *Engel v. Cass*, 28 No. Dak. 219. *Danforth v. Egan*, 23 So. Dak. 43.

It is therefore my opinion that the Constitution itself contains the implied qualification that the attorney general must be a member of the bar, and that an amendment to the Constitution would not be necessary to fix such qualification.

I have not as yet directly answered your question whether it is within the province of the Legislature to pass a law requiring the attorney general to be a member of the bar. I have stated that in my opinion the Constitution itself contains such a requirement.

By the Constitution (c. I, § I, art. IV) the Legislature is given full power to make all manner of wholesome and reasonable laws not repugnant or contrary to the Constitution, and to set forth the duties, powers and limits of the several civil and military officers of the Commonwealth, not repugnant or contrary to the Constitution. The legislative branch of the government is the repository of legislative power, and may make any law whatever, except in so far

as it is restrained by the provisions of the Constitution (where no question is involved concerning the exercise of powers granted to the Federal government by the Constitution of the United States). *Stoughton v. Baker*, 4 Mass. 522, 529; *Commonwealth v. Alger*, 7 Cush. 53, 101. The law proposed clearly would not be repugnant or contrary to the Constitution but, as I have shown, would be in exact accordance with its provisions. It is true, as the court has stated, that "where qualifications of voters or officers are fixed by the Constitution the Legislature cannot add to or subtract from them." *Opinion of the Justices*, 240 Mass. 611, 614; *Kinneen v. Wells*, 144 Mass. 497. But this rule is not applicable to a legislative act which does not add to or subtract from a constitutional requirement, but merely expresses what in the Constitution is implied. So in *Opinion of the Justices*, 240 Mass. 601, the court gave their opinion that it would be constitutionally competent for the General Court to enact legislation declaring women eligible to hold any public office within the Commonwealth, although such legislation would apply to offices the qualifications for which are determined by the Constitution. I see nothing in the proposed act inconsistent with article XXX of the Declaration of Rights.

Accordingly, it is my opinion, and I advise you, that the proposed legislation, if enacted, would not be unconstitutional, and that therefore it is within the province of the Legislature to pass such a law.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — CORRESPONDENCE SCHOOL — AGENCY.

An institution chartered under the laws of a foreign State may come into Massachusetts for the purpose of enrolling students here for instruction by correspondence, and may grant such degree as it is authorized to grant under the laws of the State from which it receives its charter; and accordingly a State statute which makes it a condition precedent to a foreign corporation engaging in this branch of interstate commerce to obtain what practically amounts to a license to transact such business is unconstitutional, as a burden and restriction upon interstate commerce. But personal instruction within the confines of this Commonwealth by a resident agent of such foreign corporation is not interstate commerce, and is accordingly within the prohibition contained in G. L., c. 266, § 89.

A resident agent of a foreign correspondence school, who by advertisement holds himself out as empowered to grant a degree, violates G. L., c. 266, § 89.

To the Com-
missioner of
Education.
1923
February 23.

You request my opinion on the following questions: —

It appears that a certain correspondence school, named the American Extension University, has been advertising the fact that a degree is awarded on completion of the prescribed course. Is this action on the part of this school a violation of G. L., c. 266, § 89?

Under what conditions can an institution chartered under the laws of a foreign State come into Massachusetts for the purpose of enrolling students here, either for personal instruction within the confines of this State or for instruction by correspondence, and thus grant a degree for the completion of the required course of study?

Can the American Extension University be held responsible for the acts of its alleged agent here?

Can its alleged agent here hold himself out as empowered to grant a degree without mentioning the name of the institution chartered to grant degrees?

The statutory provisions governing correspondence schools are contained in G. L., c. 93, §§ 19–23, inclusive. Section 22 prescribes as follows: —

The department of education may establish rules and regulations governing correspondence schools.

Section 23 provides:—

Whoever violates any provision of law relating to correspondence schools for which no penalty is provided, or of sections twenty and twenty-one or of any rule or regulation established under section twenty-two, shall be punished by a fine of not more than five hundred dollars.

Under the authority conferred by section 22, the Department of Education formulated and published certain rules and regulations, among which is the following:—

Every person, firm, association or corporation doing business in this Commonwealth as a correspondence school shall report to the Department of Education, on or before August thirty-first of each year, on blanks to be obtained from the Department on request, the following facts:—

1. Name of the school, and of organization conducting the same.
 2. Headquarters. (Give address, whether outside or inside of Massachusetts.)
 3. Management of the school, whether by individual, co-partnership or corporation.
 4. Names of officers and directors. . . .
 5. Location and designation of offices, if any, in Massachusetts.
 6. Name and address of resident agent or representative, if any, in Massachusetts.
 7. List of correspondence courses advertised and offered in Massachusetts . . . with copies of advertisements inserted in magazines or newspapers published or circulated in Massachusetts.
 8. Number of persons enrolled in each course or separately offered part thereof, in Massachusetts, for the twelve months prior to July 1st preceding the date of this report (but if the business year of the school closes at some other date, then for the last business year). . . .
 9. Number of persons receiving certificates or other evidence as to completion of courses or separate parts thereof, during the twelve months prior to July 1 preceding the date of this report, or for the last business year. . . .
 10. Brief description of samples of advertising literature circulated in Massachusetts (other than appearing in newspapers and magazines), filed with this report.
- Date of this report. Name, office, and address of person making this report.

In accordance with this rule, a report was filed on December 9, 1922, signed "Ralph Culver Bennett, 472 Boyl-

ston Street, Boston, Massachusetts. Telephone Back Bay 7598," in which it appears that the American Extension University is a corporation chartered under the laws of California, with headquarters in the Stimson Building, Los Angeles, California, its office in Massachusetts being at 472 Boylston Street, Boston, Mass., and its resident agent or representative in Massachusetts being Professor Ralph Culver Bennett, D.C.L., LL.D. Said report also states that the only advertisement used is the one set forth in full in the answer to question No. 7, as follows: —

Solely a Law Course.

Only advertisement used is as follows:

"Law professor, D.C.L. Yale, has complete law correspondence course. Anyone may enroll. No books required. Time payments. Invaluable business training, complete Bar preparation, and degree. Consult Professor R. C. Bennett, D.C.L., LL.D., 472 Boylston St., Boston. Telephone Back Bay 7598."

You state that this advertisement has appeared in street cars.

It also appears that in answer to question No. 8 of the report required of correspondence schools, *supra*, the following reply was given: —

Have been located here in Boston only since September 1, 1922.

Since that date I have enrolled four (4) students in Massachusetts, (only four) and in Law — the only course given by the American Extension University. However, 21 are now studying law in Massachusetts under my direction. I am an attorney-at-law of Illinois and of Texas. Have been a teacher and professor of law and am ex-Asst. State's Attorney for Cook County, Illinois.

G. L., c. 266, § 89, prescribes as follows: —

Whoever, in a book, pamphlet, circular, advertisement or advertising sign, or by a pretended written certificate or diploma, or otherwise in writing, knowingly and falsely pretends to have been an officer or teacher, or to be a graduate or to hold any degree, of a college or other educational institution of this commonwealth or elsewhere, which is authorized to grant degrees, or of a public school of this commonwealth, and whoever,

without the authority of a special act of the general court granting the power to give degrees, offers or grants degrees as a school, college or as a private individual, alone or associated with others, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. Any individual, school, association, corporation or institution of learning, not having power to confer degrees under a special act of the general court, using the designation of "university" or "college" shall be punished by a fine of one thousand dollars; but this shall not apply to any educational institution whose name on July ninth, nineteen hundred and nineteen, included the word "university" or "college."

A literal interpretation of this statute would seem to forbid any individual, school, association, corporation or institution of learning not having the power to confer degrees under a special act of the General Court of this Commonwealth from offering or granting degrees as a school, college or private individual, and would also seem by its terms to prohibit the use of the designation of "university" or "college" by any individual, school, association, corporation or institution of learning not having the power to confer degrees under a special act of the General Court. It appears from the report filed by the agent of the American Extension University, *supra*, that the university is a corporation chartered under the laws of the State of California, and, although the power to grant degrees is not referred to therein, nevertheless, in the booklet apparently prepared by said university and distributed through its agent, appears the following statement on page 1:—

The American Extension University is chartered under the laws of the State of California, as an educational institution, and is authorized to give instruction either to resident students or by correspondence, and to confer all appropriate honors and degrees.

The Extension Law Department of the University gives a complete course in law by correspondence, leading to the degree of bachelor of laws, — LL.B.

The Supreme Court of the United States has decided, in the case of *International Textbook Co. v. Pigg*, 217 U. S. 91,

that intercourse or communication between persons in different States, through the mails and otherwise, and relating to matters of regular, continuous business, such as teaching by correspondence, and the making of contracts relating to the transportation thereof, is commerce among the States, within the commerce clause of the Federal Constitution, and accordingly a State statute which makes it a condition precedent to a foreign corporation engaging in this legitimate branch of interstate commerce to obtain what practically amounts to a license to transact such business is a burden and restriction upon interstate commerce, and as such is unconstitutional.

I am accordingly of the opinion that an institution chartered under the laws of a foreign State may come into Massachusetts for the purpose of enrolling students here for instruction by correspondence, and may grant such degree as it is authorized to grant, under the laws of the State from which it receives its charter, for the completion of the required course of study; but I am also of the opinion that personal instruction within the confines of this State by a resident agent does not come within the principle laid down in the case of *International Textbook Co. v. Pigg, supra*, and accordingly is within the prohibition contained in G. L., c. 266, § 89.

As to how far the American Extension University may be held responsible for the acts of its alleged agent here, it would seem that the ordinary principles of the law of agency would apply, namely, that for any act committed by such agent within the actual or ostensible scope of his employment the principal could be held liable. Inasmuch as the advertisement appearing in the answer to question No. 7 of the report of correspondence schools, *supra*, does not mention the American Extension University, and the answer to question No. 8 of said report sets forth that four students in Massachusetts have been registered in the course, while twenty-one are studying law in Massachusetts under the direction of the aforesaid agent, I am of the opinion that

this method of advertising constitutes a violation of G. L., c. 266, § 89, inasmuch as it cannot be questioned but that the information conveyed to the average reader by said advertisement would entitle such reader to consider that said alleged agent holds himself out as empowered to grant a degree, which would be a violation of the statute.

In the case of *Commonwealth v. New England College of Chiropractic*, 221 Mass. 190, in construing the statute under consideration, the court says:—

Its obvious purpose is to suppress the kind of deceit which arises from the pretence of power to grant academic degrees, and to protect the public from the evils likely to flow from that variety of misrepresentation and imposition. . . . It aims to ensure to the people of the Commonwealth freedom from deception, when dealing with those who put forward professions of educational achievement such as ordinarily is accompanied by a collegiate degree from an institution authorized to grant it and to make certain that those who use such symbols have had the opportunity of being trained according to prevailing standards in some school of recognized standing, under teachers of reputation for learning. . . .

The statute should be interpreted in the light of its design to effectuate its purpose so far as the words used reasonably construed permit of this result.

EMINENT DOMAIN — NOTICE OF TAKING TO PARTIES IN INTEREST — CONFIRMATORY DEED.

Where land is taken by the Commonwealth by eminent domain, it is the duty of the board of officers who have made the taking to use reasonable diligence to ascertain the owners of the land taken, and to give notice of such taking to each and every owner thus ascertained.

Failure on the part of such board of officers to give the required notice to owners of land taken by eminent domain does not invalidate a taking.

A confirmatory deed given by the owner of land taken by eminent domain should include, among other requisites, a warranty to the extent of the amount of the award, and a provision that it is in confirmation, and not in derogation, of the rights acquired.

You request my opinion on certain questions arising from the taking or contemplated taking by your department of what you term "low value land," and I shall answer each inquiry in order.

To the Com-
missioner of
Conservation.
1923
February 24.

1. How far must this department proceed in attempting to find out the ownership of lands taken, and in determining the status of the title of parties known to have an interest in the land taken or who claim to have an interest?

So far as your duty under the law is concerned, it is set forth in G. L., c. 79, § 8, which reads, in part, as follows: —

Immediately after the right to damages becomes vested, the board of officers who have made a taking under this chapter shall give notice thereof to every person whose property has been taken or who is otherwise entitled to damages on account of such taking.

It is apparent, therefore, that it is your duty to use reasonable diligence to ascertain the owners of the land taken, and it might well be that information from the local assessors would be sufficient, as they, presumably, keep themselves informed on matters of such ownership. Where, however, there is a question of ownership, and conflicting claims, to the knowledge of your department, it is your duty to have such search of title made as will in each case justify the award you make.

2. Is it en incumbent upon this department to notify each and every owner of land taken, when such owners are known?

To that question my answer is "Yes." See *Wright v. Lyons*, 224 Mass. 167.

3. After a taking has been made, is a release from an owner to the Commonwealth sufficient or is a warranty deed essential in clearing interior holdings?

To that question I reply that the ordinary release is insufficient, but that the deed taken should include, among its other requisites, a warranty to the extent of the amount of the award and a provision that it is in confirmation, and not in derogation, of the rights acquired by the taking.

4. After a taking has been placed on record, in compliance with the provisions of the act above mentioned, how long a period of time must elapse before this department can absolutely be assured that its plans for development of the lands taken cannot be affected in any way by claims of any nature by any party or parties who might consider their interests or possible interests affected by said takings?

In this connection, I call to your attention again G. L., c. 79, § 8, particularly the last line thereof, which says: —

Failure to give notice shall not affect the validity of the proceedings, or the time within which a petition for damages may be filed, except as provided by section sixteen.

Section 16 is as follows: —

A petition for the assessment of damages under section fourteen may be filed within one year after the right to such damages has vested; but any person whose property has been taken or injured, and who has not received notice under section eight or otherwise of the proceedings whereby he is entitled to damages at least sixty days before the expiration of such year, may file such petition within six months from the time when possession of his property has been taken or he has otherwise suffered actual injury in his property.

I therefore advise you that anyone who is entitled to notice, but who has received none, may not bring action to question the validity of the taking, but is left to such remedy as is afforded by section 16, and must bring his action within the time fixed by that section. As G. L., c. 79, § 12, provides, in part, that “the damages for property taken under this chapter shall be fixed at the value thereof before the taking,” such a claimant, even if he established his claim, might not claim the value of the land as enhanced by any improvements made by the Commonwealth.

CONSTITUTIONAL LAW — CRIMINAL CASES — BURDEN OF PROOF.

An act which provides, in substance, that after some material facts have been established in criminal cases, the burden of proof with respect to certain essential facts may, under certain circumstances, be placed upon the defendant, is constitutional.

To the
Governor.
1923
February 26.

You request me to consider House Bill No. 1120, entitled "An Act relative to the burden of proof in prosecutions for certain violations of the laws relative to hunting and trapping by aliens."

The proposed bill amends G. L., c. 131, § 16, so that said section shall read as follows:—

No unnaturalized foreign born person who has resided within the commonwealth for ten consecutive days, who does not own real estate in the commonwealth to the value of five hundred dollars or more, shall hunt, capture or kill any wild bird or animal of any description, excepting in defence of the person, and no such person shall, within the commonwealth, own or have in his possession or under his control a shotgun or rifle; any shotgun or rifle owned by him or in his possession or under his control shall be forfeited to the commonwealth. Violations of this section shall be punished by a fine of fifty dollars or by imprisonment for not more than one month, or both. If, in any prosecution for violation of this section, the defendant alleges that he has been naturalized or that he owns real estate in the commonwealth to the value of five hundred dollars or more, the burden of proving the same shall be upon him.

The bill thus places upon the defendant, after the Commonwealth has established certain material facts, the burden of proving that he has been naturalized or that he owns real estate in the Commonwealth to the value of \$500. These are matters which relate to him personally, and which are exceedingly difficult and, in many cases, impossible for the State to prove.

Where the subject-matter of a negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him. (12 Cyc. 381, 382.)

In *Commonwealth v. Williams*, 6 Gray, 1, 5, the court said: —

It is no new thing in the history or administration of the law, that peculiar and artificial force is given or attributed to particular facts, or series of facts, as means and instruments of legal proof. This may be seen in many of the rules of evidence which prevail by the common law, and in others which derive their force from legislative acts. These then are conclusive presumptions, which, from motives of public policy, or for the sake of greater certainty, or for the promotion of the peace and quiet of the community, have been adopted by common consent. Sometimes the common consent, by which this class of presumptions is established, is declared through the medium of the judicial tribunals, and thus becomes a part of the common law of the land. And sometimes it is expressly declared by the direct authority of the Legislature in statutes duly enacted.

See, also, *Duggan v. Bay State Street Ry. Co.*, 230 Mass. 370, 380.

In *Holmes v. Hunt*, 122 Mass. 505, 517, the court said: —

The statutes of this Commonwealth have imposed upon the defendant in criminal prosecutions the burden of proving any license, appointment or authority, relied on as a justification, which the Commonwealth, but for these statutes, would have been obliged to disprove.

Such statutes have been held to be constitutional. *Holmes v. Hunt*, *supra*; *Commonwealth v. Williams*, 6 Gray, 1; *Commonwealth v. Lahy*, 8 Gray, 459; *Commonwealth v. Carpenter*, 100 Mass. 204; *Commonwealth v. Anselvich*, 186 Mass. 376, 378; *Duggan v. Bay State Street Ry. Co.*, 230 Mass. 370, 380.

As early as 1793 statutes were enacted in this Commonwealth providing that the proof of certain facts be treated as presumptive evidence of guilt, and placing the burden of proof on the defendant to discharge himself. St. 1793, c. 42, § 6. See also St. 1833, c. 148, § 3; St. 1844, c. 102, § 1; St. 1849, c. 158, § 1.

Thus the history of both legislative and judicial decisions in this Commonwealth shows that under certain circum-

stances, after some material facts have been established, the burden of proof with respect to certain essential facts may be placed upon the defendant. It is not necessary, for the purposes of this opinion, to consider the limitation upon the power of the Legislature so to act.

I am therefore of the opinion that the proposed bill, if enacted, would be constitutional.

CONSTITUTIONAL LAW — “ANTI-AID” AMENDMENT —
PLAYGROUNDS — LEASE OF PARK LANDS BY CITY.

Legislation designed or framed to accomplish the ultimate object of placing property in the hands of one or more private persons after it has been taken by the superior power of the government from another private person, avowedly for a public purpose, is unconstitutional.

The Legislature may authorize the sale or lease of land held for a public purpose when the public purpose designed has been completely accomplished, or when through lapse of time or changed conditions continued ownership of the land by the public agency is no longer necessary or needed.

Land of a city or town held strictly for public uses as a park, and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court, which may transfer it to some other agency of government or devote it to some other public use.

Whether a statute appropriates property to a public use or to a private use is a judicial question, upon which the constitutionality of the act depends.

The advisability, necessity or expediency of passing legislation is a matter solely for the determination of the Legislature.

To the House
Committee on
Cities.
1923
March 12.

You request my opinion as to the constitutionality of House Bill No. 1126, entitled “An Act to enable the city of Melrose to improve and adapt certain of its undeveloped park lands located on Lynn Fells Parkway and Tremont Street to the purpose for which they were acquired by said city.”

Said bill reads as follows: —

SECTION 1. The city of Melrose is hereby authorized by and with the consent of its park commission to lease at a nominal rental for a term of not exceeding ninety-nine years certain of its now undeveloped park lands more particularly described in section two of this act to an association or corporation to be organized and maintained by Melrose citizens for the purpose of improving said park lands by constructing and enclos-

ing an athletic field and erecting structures thereon for use in connection with athletics. Such association or corporation may rent the same for athletic contests and may charge or permit a charge for admission thereto, but when not so used shall, subject to reasonable rules and regulations, permit the inhabitants of said city to use the same as a playground; it may issue bonds or other obligations for the purpose of raising funds for such improvement and in all respects, except as herein otherwise provided, may control and manage said property during the term of said lease and from time to time establish rules and regulations governing the use thereof. All profits accruing to said association or corporation from the use and management of said property shall be used for the further development and improvement thereof.

SECTION 2. The land that may be leased as herein authorized consists of about seven acres located north of Lynn Fells parkway and east of Tremont street in said city and is more particularly bounded and described as follows:— Beginning at the northeast corner of Lynn Fells parkway and Tremont street northerly by Tremont street, six hundred and ninety-five feet more or less to land of R. J. Munn and brothers; thence easterly on land of said Munn and brothers, land of DeMar and by Union street, four hundred and fifteen feet more or less to land now or formerly of Conway estate; thence southerly by said land of Conway estate three hundred and thirty-eight feet more or less to the southwesterly corner of said land of Conway estate and the present park line; thence easterly one hundred and five feet more or less on said Conway estate land and along said park line to land of William Magner and the line of the proposed extension of Ashland street; thence southerly by the proposed extension of Ashland street two hundred feet more or less to Lynn Fells parkway; thence westerly by Lynn Fells parkway seven hundred feet more or less to the point of beginning.

SECTION 3. So long as said property is used solely for the purposes herein expressed, it shall be exempt from taxation but whenever it shall cease to be so used the said leasehold term shall terminate and said land shall revert to the city of Melrose and any structures thereon become its absolute property.

SECTION 4. This act shall take effect upon its acceptance by a vote of the board of aldermen of said city within two years from the date of its passage and the terms of any lease under the authority hereby granted shall be approved by vote of said board.

It does not appear in what manner this land was acquired by the city of Melrose, whether by a taking under the right of eminent domain, purchase or gift. I assume, however, that said land was acquired and is now held for playground

purposes under the provisions of G. L., c. 45, § 14 (R. L., c. 28, § 19).

In *Wright v. Walcott*, 238 Mass. 432, the court says: —

Land acquired by a city or town by eminent domain or through expenditure of public funds, held strictly for public uses as a park and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court. It may be transferred to some other agency of government or devoted to some other public use by legislative mandate. The power of the General Court in this regard is supreme over that of the city or town. When title in fee is acquired in the land by the municipality for such a public use, there is no right of reversion to the original owner. He has been divested of every vestige of title when he parted with the fee. *Higginson v. Treasurer & School House Commissioners of Boston*, 212 Mass. 583. *Stewart v. Kansas City*, 239 U. S. 14, 16.

Playgrounds acquired and maintained by cities and towns are closely analogous in their essential features to parks. See *Higginson v. Treasurer & School House Commissioners of Boston*, *supra*, and cases cited.

But legislation designed or framed to accomplish the ultimate object of placing property in the hands of one or more private persons after it has been taken by the superior power of the government from another private person, avowedly for a public purpose, is unconstitutional. See *Wright v. Walcott*, *supra*; *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371, and cases there reviewed and collected.

Undoubtedly the Legislature may, under our Constitution, authorize the sale or lease of land held for a public purpose when the public purpose designed has been completely accomplished, or when through the lapse of time or changed conditions continued ownership of the land by the public agency is no longer necessary or needed for the public purpose for which the land was acquired. *Chase v. Sutton Mfg. Co.*, 4 Cush. 152; *Winnisimmet Co. v. Grueby*, 209 Mass. 1; *Bancroft v. Cambridge*, 126 Mass. 438; *Wornden v. New Bedford*, 131 Mass. 23; *Dingley v. Boston*, 100

Mass. 544; *Davis v. Rockport*, 213 Mass. 279; *Sweet v. Rechel*, 159 U. S. 380; *Wright v. Walcott*, *supra*, and cases cited. So, also, since 1901 there has been a general law in this Commonwealth authorizing the abandonment of lands, easements and other rights taken by cities and towns otherwise than by purchase, upon compliance with certain conditions set forth in the statute. G. L., c. 40, § 15. The omission therein of mention of land acquired by purchase or gift is significant. But the apparent design of the bill under consideration is to permit the lease for a term not exceeding ninety-nine years of the aforesaid undeveloped park lands, in order that they may be improved and better adapted to the purpose for which they were acquired by the city. The power to lease is limited "to an association or corporation to be organized and maintained by Melrose citizens for the purpose of improving said park lands by constructing and enclosing an athletic field and erecting structures thereon for use in connection with athletics."

If this bill works simply a change of control of said park land, taking it from one party who holds it for a public use and transferring it to another to hold in the same manner for precisely the same public use, there may well be a constitutional objection. To such a situation the case of *Cary Library v. Bliss*, 151 Mass. 364, seems applicable. In that case, in holding that a public library held upon a public charitable trust of indefinite duration by trustees provided by the donor could not be taken by eminent domain and transferred to a corporation created to manage it for like purposes, the court said:—

The question arises, whether taking property from one party, who holds it for a public use, by another, to hold it in the same manner for precisely the same public use, can be authorized under the Constitution. Can such a taking be founded on a public necessity? It is unlike taking for a public use property which is already devoted to a different public use. There may be a necessity for that. In the first case, the property is already appropriated to a public use as completely in every particular as it is to be. Can the taking be found to be for the purpose which must

exist to give it validity? In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the Legislature to say whether in a particular case the necessity exists. We are of opinion that the proceeding authorized by the statute was in its nature merely a transfer of property from one party to another, and not an appropriation of property to public use, nor a taking which was, or which could be found by the Legislature to be, a matter of public necessity. *West River Bridge v. Dix*, 6 How. 507. *Lake Shore & Michigan Southern Railway v. Chicago & Western Indiana Railroad*, 97 Ill. 506. *Chicago & Northwestern Railway v. Chicago & Evanston Railroad*, 112 Ill. 589.

See also VI Op. Atty. Gen. 508. It is to be noted, however, that the case of *Cary Library v. Bliss*, *supra*, involved a trust created by will.

In *Wright v. Walcott*, *supra*, the court expressly states that land of a city or town held strictly for public uses as a park *and not subject to the terms of any gift, devise, grant, bequest or other trust or condition*, is under the control of the General Court, which may transfer it to some other agency of government or devote it to some other public use. This is in accord with the general rule that the public property of a city or town does not belong to it in the same absolute sense as the property of an individual belongs to him, but is held by it, as a subordinate part of the government, for public uses, and subject to the authority of the Legislature, which may change or authorize a change of the public agency of government in charge of it. *Higginson v. Treasurer & School House Commissioners of Boston*, 212 Mass. 583, and cases cited; *Stone v. Charlestown*, 114 Mass. 214; *Ware v. Fitchburg*, 200 Mass. 61, and cases cited.

The bill under consideration does not involve any taking of property either from a private person or from the public. There is nothing in the bill which takes away from the city its legal title to the land. It merely authorizes the leasing of property already owned and held by the city. In this respect, also, the case of *Cary Library v. Bliss*, *supra*, is distinguishable.

The question whether a statute appropriates property to

a public use or to a private use is a judicial one, upon which the constitutionality of the act depends. Consequently, the determination of the Legislature thereon may be revised by the court. But the question as to the advisability, necessity or expediency of passing legislation is solely for the determination of the Legislature. *Boston v. Talbot*, 206 Mass. 82; *Moore v. Sanford*, 151 Mass. 285; *Lowell v. Boston*, 111 Mass. 454; *Opinion of the Justices*, 204 Mass. 607.

The next question is whether the management of this undertaking can constitutionally be vested in the association or corporation to be formed as provided in this bill, in view of the so-called "anti-aid amendment" (Mass. Const., Amend. XLVI). The second section of said amendment provides, in part: —

. . . and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both. . . .

The plain intent of this amendment is to require that the expenditure of public money for any educational, charitable or religious undertaking which possesses the requisite public character shall be under exclusive public control.

In deciding this question it is to be observed that although said association or corporation may rent the premises "for athletic contests and may charge or permit a charge for admission thereto," it is significant that it is authorized to issue bonds or other obligations for the purpose of raising funds for improvement, and it is particularly provided that "all profits accruing to said association or corporation from

the use and management of said property shall be used for the further development and improvement thereof." Likewise significant are the provisions for freedom from taxation and termination of the lease contained in section 3 of the bill.

It is obvious that said contemplated lessee cannot operate for profit; also, that the city of Melrose is not authorized to appropriate any money to assist the lessee in its work. It would seem that the contemplated undertaking is not religious, charitable or educational, within the meaning of said constitutional amendment. Accordingly the case is dissimilar in all material respects to that upon which the Attorney-General rendered an opinion to the committee on bills in the third reading. VI Op. Atty. Gen. 117. I am therefore of the opinion that the bill does not fall within the scope of said amendment. Nor can it be said that the bill is unconstitutional because it takes away from the city the use or control of public property which had become vested in it for a public purpose. Even if the bill had this effect, the objection would be cured by the fact that the lease therein authorized is subject to the consent of the park commissioners of the city of Melrose, the body vested with charge and control of parks and playgrounds. The city, therefore, could not well complain of a use of its property to which it assents through its duly constituted authority. See *Ware v. Fitchburg*, 200 Mass. 61, and cases cited.

Your committee is entitled to take into consideration all the facts relating to the pending bill in determining whether or not the necessity exists for granting the authority therein referred to.

In my opinion the bill, if enacted, would be constitutional.

CONSTITUTIONAL LAW — PUBLIC MONEY — REIMBURSEMENT.

A proposed bill which authorizes the city of Boston to discharge its obligation to reimburse a certain company for losses sustained in certain coal deliveries is constitutional, inasmuch as the reimbursement is not a gift of the public money but is in the nature of compensation for value received by the city.

You request me to consider Senate Bill No. 31, entitled "An Act authorizing the city of Boston to discharge its obligation to reimburse the D. Doherty Company for losses sustained in certain coal deliveries."

To the
Governor.
1923
March 13.

While the bill itself does not definitely disclose the precise nature of the obligation referred to therein, I have ascertained from data submitted to the committee on cities that the D. Doherty Company, in order to supply the amount of coal to the schools of Boston called for by its contract, was obliged to purchase coal from certain sources at an increased price, and that the sum set forth in the bill represents the difference between the contract price and the replacement price; in other words, the actual loss sustained by the D. Doherty Company in filling its contract.

Apparently the D. Doherty Company was under no legal obligation to supply this coal or to go on with its contract, inasmuch as it was undoubtedly discharged from its obligation to make deliveries thereunder by reason of seizures of its coal by the Federal government in the exercise of war-time powers.

On these facts, there is an unquestionable moral or equitable right to reimbursement. But, regardless of the moral obligation, if the bill in effect authorizes the city of Boston to pay out money raised by general taxation gratuitously to an individual, although under no legal obligation to do so, it is manifestly unconstitutional unless some public purpose or interest is furthered thereby.

The Supreme Judicial Court of this Commonwealth has rigidly applied the rule that public money can be expended only for a public purpose.

In *Whittaker v. Salem*, 216 Mass. 483 (a case in which a moral obligation unquestionably existed), the court says:—

However meritorious the project may appear to be either in its practical or ethical or sentimental aspects, if it is in essence a gift to an individual rather than a furthering of the public interest, money raised by taxation cannot be appropriated for it. These principles often have been declared respecting a great variety of subjects and cannot be doubted.

To the same effect are *Lowell v. Boston*, 111 Mass. 454; *Mead v. Acton*, 139 Mass. 341; *Kingman v. Brockton*, 153 Mass. 255; *Opinion of the Justices*, 204 Mass. 607; *ibid.*, 211 Mass. 624.

But on the facts before me it cannot fairly be said that the bill under consideration authorizes a gift. Rather, it would seem that it authorizes compensation or reimbursement for value received by the city.

It has been decided in several cases that towns may vote money to indemnify their agents who may incur a liability in the performance of their duties, although the towns were under no legal obligation to do so. *Nelson v. Milford*, 7 Pick. 18; *Bancroft v. Lynnfield*, 18 Pick. 566. In the case of *Friend v. Gilbert*, 108 Mass. 408, it was decided that a town could properly award a sum of money as compensation to an individual who had rendered valuable service to the town, although no contract existed for such services. The court there said:—

The petitioners contend that the town had no legal relation or connection with Watson, and therefore that the payment to him is a gratuity or gift. It is true the town had no express contract with him, but they had a direct and vital interest in his work and its quality, and we cannot regard the proposed payment to him as a mere gratuity. The vote is, to pay him five thousand dollars as compensation, that is, as an equivalent, for his services, and for the benefits received by the town, and not as a gift without consideration. The fact that the town was under no legal obligation to pay does not make it a gift without equivalent. . . .

We are of opinion, in this case, that it was within the corporate power of the town to pass the vote in question. Whether it was wise to do so,

was a matter within the discretion of the inhabitants of the town; and, in the absence of fraud or corruption, we cannot revise their judgment.

The facts of the present case are fully as strong, if not stronger than those in the case last cited. I am accordingly of the opinion that the proposed bill, if enacted, would be constitutional.

INSURANCE — JOINT AND SEVERAL LIABILITY OF TWO OR MORE COMPANIES — USE OF CORPORATE NAME OF MORE THAN ONE INSURANCE COMPANY AT THE HEAD OF A POLICY.

A policy of insurance on which two or more companies are jointly and severally liable may not be issued except when specifically authorized by statute.
A contract of insurance must be headed or entitled only by the name of the company issuing the policy.

You request my opinion as to the effect of the first clause of G. L., c. 175, § 18, requiring, as you state, that a contract of insurance shall "be headed or entitled only by the name of the company." You ask to be advised whether that clause "prevents the use of policies on which two or more companies are severally and jointly liable." The first clause of G. L., c. 175, § 18, is as follows: —

To the Com-
missioner of
Insurance.
1923
March 21.

Every company shall conduct its business in the commonwealth in its corporate name, and all policies and contracts, other than contracts of corporate suretyship, issued by it, shall, except as provided in section fifty-six of chapter one hundred and fifty-two, be headed or entitled only by such name.

You submit with your letter a copy of the proposed policy, entitled "automobile policy," which is neither a contract of corporate suretyship nor one falling within the exemption of G. L., c. 152, § 56. It purports to be a policy establishing a joint and several liability on seven companies, all of whose corporate names head the policy.

G. L., c. 175, § 105, specifically authorizes fidelity and corporate surety companies to "act as joint or sole surety" upon official and other bonds.

G. L., c. 152, § 56, specifically authorizes two or more insurance companies to "unite in issuing joint and several workmen's compensation policies which may be headed by the names of all such companies."

The provisions of G. L., c. 175, as to reinsurance of risks do not apply to this proposition.

It would seem clear, therefore, that the Legislature has clearly indicated under what circumstances a company may undertake a joint and several liability, and under what circumstances the names of more than one company may head a contract of insurance. As the policy in question does not fall within the exceptions noted in section 18, it may not be written by several companies and headed by their names.

I answer your question, therefore, in the negative.

CONSTITUTIONAL LAW — “ANTI-AID” AMENDMENT — APPROPRIATION OF PUBLIC MONEY FOR PRIVATE PURPOSES — SOLDIERS’ HOME — CIVILIAN EMPLOYEES — CIVIL SERVICE RULES AND REGULATIONS — STATE RETIREMENT SYSTEM.

The Soldiers’ Home is a privately owned charitable corporation, not a State institution.

Employees of the Soldiers’ Home are not employees of the Commonwealth, and are not within the scope of the State retirement system, provided for by G. L., c. 32, §§ 1-5.

Employees of the Soldiers’ Home are not “in the service of the Commonwealth,” within the meaning of G. L., c. 31, § 3, and are not subject to the civil service rules and regulations.

A statute extending the State retirement system so as to include all civilian employees of the Soldiers’ Home would authorize the employment of public money for private purposes, and would be unconstitutional.

A statute extending the State retirement system so as to include the civilian employees of the Soldiers’ Home is not an appropriation “for the maintenance and support of the Soldiers’ Home in Massachusetts,” authorized by Mass. Const. Amend. XLVI, § 2.

In your letter of February 23rd you request my opinion on the following questions: —

To the
House of Rep-
resentatives.
1923
March 22.

1. Are the employees of the Soldiers’ Home State employees, within the general meaning of that term in the statutes?

2. Are the employees of the Soldiers’ Home subject to the civil service laws, rules and regulations now in force?

3. If your answer to question 1 is in the affirmative, are State employees at the Soldiers’ Home now within the scope of the State retirement act, or is a special act necessary to bring them within its provisions?

4. If your answer to question 2 is in the negative, will you then answer the question — would House Bill No. 784, if enacted into law, be constitutional?

“The Trustees of the Soldiers’ Home in Massachusetts” was incorporated by St. 1877, c. 218, amended by St. 1886, c. 32. The number of trustees was limited to eighteen, of whom fifteen were to be members of the voluntary association known as the Department of Massachusetts, Grand Army of the Republic. In 1889 the number of trustees was increased from eighteen to twenty-one, the three new trus-

tees to be appointed by the Governor, by and with the advice and consent of the Council. St. 1889, c. 282. By Res. of 1905, c. 77, \$100,000 was appropriated by the Commonwealth, to be expended under the direction of the Trustees of the Soldiers' Home, for the construction and furnishing of an additional building. A reversionary interest in the building was reserved to the Commonwealth by this resolve.

The Soldiers' Home is financed in part by the income from voluntary contributions and bequests, and in part by yearly appropriations by the Commonwealth. Mass. Const. Amend. XLVI, § 2, which forbids State contributions to private charitable organizations, contains a specific exception to the effect "that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town." Finally, the Soldiers' Home relies also for its support upon income derived from the Federal government. \$120 per annum is paid by the Federal government to the Commonwealth of Massachusetts for each inmate of the Home. The sums so received by the Commonwealth are paid over to the treasurer of the Soldiers' Home, in accordance with the provisions of St. 1890, c. 373.

1. In my opinion, the Soldiers' Home is a privately owned charitable corporation. Although the Commonwealth contributes to the support of the Home, it is not a State institution, and the employees of the Home are in no sense employees of the Commonwealth. In this connection your attention is respectfully directed to an opinion rendered by the Attorney-General on February 5, 1913, in response to a letter from the treasurer of the Soldiers' Home requesting an opinion as to whether the Home should be covered by insurance under the workmen's compensation act, St. 1911, c. 751. In determining this question it was necessary to decide whether the Home was a State institution. On this point the opinion states: "The Home is not a State institution, and the employees of the Home are in no sense

employees of the Commonwealth." My answer, therefore, to the first question propounded by you is in the negative.

2. Section 3 of the present civil service law, G. L., c. 31, provides that the Civil Service Commission shall, subject to the approval of the Governor and Council, from time to time make rules and regulations which shall regulate the selection of persons to fill appointive positions in the government of the Commonwealth, the several cities thereof, and certain towns, and the selection of persons to be employed as laborers or otherwise "in the service of the Commonwealth and said cities and towns." Clause 5 of rule 1 of the civil service rules provides:—

Persons paid by the Commonwealth or any city, whether carried on the regular payroll, on special payroll or by presenting a bill personally or by some other person, company or corporation, shall be deemed to be "in the service of the Commonwealth or the city" within the meaning of these rules.

As the employees of the Soldiers' Home are neither employed nor paid by the Commonwealth, it is my opinion that they are not subject to the civil service laws, rules and regulations now in force; and my answer to your second question is also in the negative.

3. G. L., c. 32, § 2, provides for a retirement association for the employees of the Commonwealth, including employees in the service of the Metropolitan District Commission. Section 1 of the same act, as amended by St. 1922, c. 341, § 1, defines "employees" as meaning "persons permanently and regularly employed in the direct service of the Commonwealth or in the service of the Metropolitan District Commission, whose sole or principal employment is in such service." It is apparent from what has been said above that the employees of the Soldiers' Home are not now within the scope of the State retirement act.

4. Your final question is whether House Bill No. 784, if enacted into law, would be constitutional. The act pro-

vides, in substance, that all civilian employees of the Trustees of the Soldiers' Home in Massachusetts shall be brought within the provisions of the present State retirement system, G. L., c. 32, §§ 1-5.

As a general proposition, it seems clear that a law authorizing the employment of State funds, under a retirement system such as that now in force in the Commonwealth, to pension the ex-employees of a public charitable corporation other than a State institution would be unconstitutional.

Looked at, if it may be so regarded, as a circuitous method of benefiting the public charitable corporation itself, such an act would violate the terms of Mass. Const. Amend. XLVI, the so-called "anti-aid" amendment, and would therefore be unconstitutional. Looked at from the viewpoint of the individual recipients of the pension, such an act would authorize the employment of public money for private purposes, and would therefore be unconstitutional. *Lowell v. Boston*, 111 Mass. 454; *Whittaker v. Salem*, 216 Mass. 483; *Opinion of the Justices*, 175 Mass. 599; *Loan Assn. v. Topeka*, 20 Wall. 655.

The pensioning of certain special classes of persons is clearly within the constitutional authority of the Legislature. Veterans of former wars are one example of a class to whom the Legislature may thus disburse public money. The constitutionality of such action rests, however, upon considerations quite apart from those involved in the present problem. It rests upon the power to reward unusual and distinguished public service, and because a public purpose is deemed involved, namely, the promotion of a spirit of loyalty and patriotism. See *Opinion of the Justices*, 211 Mass. 608; *Opinion of the Justices*, 190 Mass. 611.

State employees form another group, the constitutionality of whose pensioning appears never to have been questioned. Unusual and distinguished public service can here hardly be held the justification for State expenditures. The constitutional power of the Legislature to pension State em-

ployees probably rests, in part, upon one or both of the following considerations. It may be thought that by pensioning its own employees the State secures more efficient service, either because a contented employee may be expected to render better service than a discontented one; or because the prospect of recompense at the completion of a period of continuous service is likely to lead to a desire to remain in that service, and therefore to an effort to give satisfaction. On the other hand, a pension system may be looked upon perhaps simply as a part of the consideration which the State gives to secure the services which it needs. A dictum in *Opinion of the Justices*, 175 Mass. 599, appears to rest the power upon the latter basis.

The questions, as we understand them, both assume that there was no provision of law in existence before the death of the officer by which the money in question would be payable as supposed. If such a provision should be enacted with regard to the widow, heirs, or legal representatives of a living officer, it naturally would be regarded as pledging the faith of the State to the officer himself, and thus as constituting part of the consideration for his future service.

Mass. Const. Amend. XLVI expressly exempts from the scope of its inhibition certain appropriations, and provides that "appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts."

The final inquiry made by you therefore resolves itself into the single question: Can the constitutionality of House Bill No. 784 be supported by reason of the phrase in the "anti-aid" amendment which authorizes appropriations for the maintenance and support of the Soldiers' Home?

If pensions to employees are in fact a part of the consideration of their contract of employment, it might be contended that a State pension to the civilian employees of the Soldiers' Home should be looked upon merely as a contribution towards the hiring of employees by the Home, — in other words, a contribution towards the support and main-

tenance of the Home, and hence within the exception to the "anti-aid" amendment.

After careful consideration I am of the opinion, however, that this line of argument, though plausible enough on its face, is untenable.

The primary object, the thing actually accomplished by extending the benefits of the present retirement system to the civilian employees of the Home, is not to benefit the Home by making it easier or cheaper for it to engage employees. As a practical matter, it may well be doubted whether the wages of employees would be a whit lower after the passage of the act than they were before. Certainly they would not be lower by the full amount of the money to be contributed by the Commonwealth. That money, either in whole or in part, would be expended for the support and maintenance, not of the Home, but of the Home's ex-employees. Such an expenditure of public money is unconstitutional. The principle which makes it so is the general one already referred to. Public money must be reserved for public purposes. That principle is wholly unrelated to the "anti-aid" amendment, and the saving clause in that amendment cannot be relied upon to warrant the expenditures in question. The clause can be no broader in scope than the general prohibition to which it is merely an exception.

Moreover, the phrase "for the maintenance and support of the Soldiers' Home" must be construed strictly. A broad, sweeping prohibition was enacted. A single specific exception was then inserted therein. Since this exception limits the application of the general policy evinced by the amendment as a whole, and is in the nature of a special privilege or grant, by familiar principles of interpretation it must be construed strictly and not extended by implication. *Butchers Slaughtering, etc., Assn. v. Boston*, 214 Mass. 254, 258. In my opinion, the words used go no farther than to authorize the Legislature to continue in the future, as it had done in the past, to make voluntary contributions towards the

support and maintenance of the Home. They did not contemplate, and cannot, I believe, be deemed to authorize, an act which purports to obligate the Commonwealth in the future to expend money as needed to pension ex-employees of the Home.

Further, House Bill No. 784 would impose the retirement system upon all employees of the Soldiers' Home, whether they desired it or not. Serious doubts might arise, in my opinion, as to the constitutionality of what would appear to be an impairment of the obligation of those contracts of service between the Home and its employees which might be in existence at the time the act becomes effective. In view of the conclusion arrived at above, however, I need not develop further this aspect of the problem.

I am constrained to advise you in reply to your fourth inquiry that, in my opinion, House Bill No. 784, if enacted, would be unconstitutional.

CORPORATIONS — STOCKHOLDERS — RIGHT TO INSPECT CORPORATE RECORDS.

A proposed bill is constitutional which provides that, if an action for damages or a proceeding in equity is commenced for neglect or refusal to exhibit for inspection the stock and transfer books of a corporation, "it shall be a defence that the actual purpose and reason for the inspection sought are to secure a list of stockholders for the purpose of selling said list, or copies thereof, or of using the same for a purpose other than in the interest of the applicant, as a stockholder, relative to the affairs of the corporation."

You request me to consider House Bill No. 620, entitled "An Act relative to the exhibition of certain corporate records for inspection by stockholders."

To the
Governor.
1923
March 23.

This bill contemplates an amendment of G. L., c. 155, § 22, under which a stockholder is given an absolute right to inspect the stock and transfer books of a corporation, regardless of his purpose in making such examination. Statutes of other jurisdictions confer upon stockholders a similar right, and have been upheld by the courts thereof. *Foster*

v. *White*, 86 Ala. 467; *Johnson v. Langdon*, 135 Cal. 624; *State v. Middlesex Banking Co.*, 87 Conn. 483; *Stone v. Kellogg*, 165 Ill. 192; *Ellsworth v. Dorwart*, 95 Ia. 108; *Knox v. Coburn*, 117 Me. 409; *Wight v. Heublein*, 111 Md. 649; *Hub Construction Co. v. New England Breeders' Club*, 74 N. H. 282; *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 198; *Kimball v. Dern*, 39 Utah, 181; *Lewis v. Brainerd*, 53 Vt. 519.

It is well settled that the common law right of a stockholder to inspect the books of a corporation is a qualified and not an absolute right, the court having power to determine whether or not a stockholder's desire for examination not only is reasonable but "has reference to the interests of the corporation and his personal interest as a member of it." *Varney v. Baker*, 194 Mass. 239; *Butler v. Martin*, 220 Mass. 224.

At common law the procedure by which a stockholder obtained access to the books of a corporation, after having been refused the privilege of inspecting them, was by writ of mandamus. Ordinarily, relief by mandamus was not given under these circumstances unless it appeared to the court that the interests or rights of the petitioner as a stockholder were likely to be seriously prejudiced and affected. But since the enactment of G. L., c. 155, § 22, the Supreme Court of this Commonwealth has held that, unless the statute imposes restrictions or limitations, the right of examination thereby granted is absolute, and the motive or purpose of the stockholder in seeking to exercise it is not the proper subject of judicial inquiry. The courts of other jurisdictions have likewise so decided in interpreting similar statutes in their jurisdictions.

In construing the present statute, in the case of *Shea v. Parker*, 234 Mass. 592, the Supreme Judicial Court says, at page 594: —

It may be presumed that before enacting the statute the Legislature considered the possibility that information thus obtained might as in the case at bar have a commercial value distinct and quite apart from the stockholder's interest as a corporate member, and undoubtedly could have made the right of examination dependent upon the motive actuating the stockholder. It has not however so done. The words conferring the right are unlimited, and the statute is mandatory. While a stockholder's right to examine the general books of account to ascertain the volume of business transacted, and the method and efficiency of corporate management is left as at common law, the stock and transfer books by the statute are at all times to be exhibited under reasonable conditions for his full examination. The right also includes making of copies and transcripts as well as the assistance of counsel and copyists for such purpose. The statute when viewed in the light of its origin should not be so construed as to reduce the right to a useless inquiry, which it necessarily would be in most cases unless the stockholder is permitted to copy the names, residences and numbers of shares of the stockholders. . . .

We are therefore of opinion that instead of being merely declaratory, or limiting the right to the sound discretion of the court, the statute was intended to do away with the restrictions imposed at common law on the examination of the stock and transfer books of a domestic corporation.

Under the terms of the proposed bill, if an action for damages or a proceeding in equity is commenced under the statute for neglect or refusal to exhibit for inspection the stock and transfer books, "it shall be a defence that the actual purpose and reason for the inspection sought are to secure a list of stockholders for the purpose of selling said list, or copies thereof, or of using the same for a purpose other than in the interest of the applicant, as a stockholder, relative to the affairs of the corporation."

The effect of this amendment would seem to restore, to a large measure, if not entirely, the common law rule, and would authorize and require the court to exercise its sound discretion as to whether or not damages are recoverable or an injunction should lie, if the defence provided for is introduced and maintained. It is, however, unquestionably within the power of the Legislature to thus amend the statute. See *Shea v. Parker*, *supra*.

I am accordingly of the opinion that the bill, if enacted, would be constitutional.

CONSTITUTIONAL LAW — CRIMINAL CASES — PUBLIC TRIAL.

The right of persons accused of crime to have a public trial has always been recognized in this Commonwealth.

An act providing that the public be excluded from the trial of all criminal cases, or of all cases involving moral turpitude, would be unconstitutional.

Under certain circumstances, and in certain cases, the general public may be excluded.

An act providing that the general public be excluded from the trial of criminal cases involving morals or chastity, where a minor is the person upon whom the crime has been committed, would be constitutional.

To the
Governor.
1923
March 23.

You request me to consider House Bill No. 1219, entitled "An Act to protect witnesses under the age of seventeen at trials for certain crimes."

The proposed bill is in effect a limitation of the right of persons accused of certain crimes to a public trial. This right is one of the most important safeguards in the prosecution of persons accused of crime. It exists for the protection of the accused; it enables the public to see that he is fairly dealt with and not unjustly condemned; it acts as a security for trustworthiness and completeness of testimony; and it keeps his triers, court, jury and counsel, alive to a strict conscientiousness in the performance of their duty.

This right, together with the right of trial by a jury of one's peers, to be informed of the nature of the accusation, to be confronted with the witnesses against him, to be heard fully in his own defence, to have compulsory process for obtaining witnesses in his favor, and to refuse to furnish evidence against himself, is the outgrowth of reforms brought about as a result of many grave abuses in England in the administration of criminal law, and became a part of the Constitution of the United States and of practically every State in the Union.

As far back as 1649 this right was claimed in England by a defendant placed on trial for treason. *Lithurne's Trial*, 4 How. St. Tr. 1269, 1273; *Cornish's Trial*, 11 How. St. Tr. 460 (1685).

In the case of *Daubney Cooper*, 10 B. C. 237, 240, the court said: —

We are all of the opinion that it is one of the essential qualities of a court of justice that its proceedings should be public.

Though there is no express provision in the Constitution that persons accused of crime shall have a right to public trial, this right has always been recognized in this Commonwealth and accorded to persons accused of crime. Article XII of the Declaration of Rights provides, in part: —

. . . And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the *law of the land*. . . .

The court has held that “the law of the land” made an indictment or presentment by a grand jury essential to the validity of a conviction in case of prosecution for felonies. *Jones v. Robbins*, 8 Gray, 329. The secrecy of grand jury proceedings has been held to be included within the meaning of the term “law of the land.” *Commonwealth v. Harris*, 231 Mass. 584; *Opinion of the Justices*, 232 Mass. 601. At page 604 of the Opinion the justices said: —

Mere rules of procedure practised by our ancestors at the time of the adoption of the Constitution did not become an inherent part of due process. But no change “can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.” *Twinning v. New Jersey*, 211 U. S. 78, 101.

An act providing that the public be excluded from the trial of all criminal cases would, in my opinion, be repugnant to article XII of the Declaration of Rights, and would be unconstitutional. The right to a public trial does not, however, mean that all persons who desire to attend criminal trials shall in all cases be permitted to do so. Bishop *Crim. Proc.* §§ 658, 659. Cooley, in his *Constitutional Limitations*, 7th ed., p. 441, speaking of this right, says: —

The requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether.

The grounds generally recognized as justification for the exclusion of the general public have been the danger of overcrowding the court room, the risk of violence or brawls, the maintenance of order and decorum in the court room, and the protection of the public morals, especially the morals of the young. *People v. Swafford*, 65 Cal. 223; *People v. Kerrigan*, 73 Cal. 222; *People v. Hall*, 51 N. Y. App. 57; *Grimmett v. State*, 22 Tex. App. 36; *State v. Brooks*, 92 Mo. 542. This is the general rule, though not recognized in some jurisdictions. See *People v. Murray*, 89 Mich. 276; *People v. Yeager*, 113 Mich. 228. In the latter case the court held invalid an act of the Legislature which provided:—

Whenever it shall appear that, upon the trial of any cause, evidence of licentious, lascivious, degrading, or peculiarly immoral acts or conduct will probably be given, the judge presiding at such trial may, in his discretion, require and cause every person, except those necessarily in attendance thereon, to retire and absent himself or herself from the court room during such trial, or any portion thereof.

In some States, by statute the court is given power to exclude the general public in cases where the evidence is vulgar and obscene and would tend to operate injuriously to the public morals, and in cases which relate to improper acts of the sexes, including such crimes as rape, assault with intent to rape, seduction, adultery, bastardy and divorce. Georgia Code (1895), § 5296; Utah Rev. Stat. (1898), § 696; Wis. Stat. (1898), § 4789.

In this Commonwealth the courts have frequently, on motion of counsel or on their own initiative, in the interest of good morals and decency, and in order to maintain proper order and decorum in the court room, excluded the general

public from the trial of cases. By statute in this Commonwealth the court is given discretionary power to exclude the general public in cases where the defendants are children under seventeen years of age, and minors, unless their presence is necessary either as parties or as witnesses, must be excluded. G. L., c. 119, § 65. The court may also exclude minors as spectators from the court room during the trial of any cause, civil or criminal, if their presence is not necessary as witnesses or parties. G. L., c. 220, § 13.

The test in all cases where this general rule is recognized is its reasonableness under the particular circumstances, both as to the class of persons excluded and as to the grounds for exclusion.

The proposed bill is doubtless intended to be in the interest of public morals, and to protect minors against being compelled to testify in public in cases where the evidence would involve their morals or chastity, would be vulgar and obscene, and would tend to degrade the person testifying. Were it in terms limited solely to such cases, I am of the opinion that it would come within the general rule and would be constitutional. The proposed bill, however, goes much farther in that it includes *all* crimes involving moral turpitude. "Moral turpitude," as legally defined, includes everything done contrary to justice, honesty, modesty or good morals. It includes every act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted or customary rule of right and duty between man and man.

In many such cases none of the recognized exceptions to the right of a defendant to a public trial could possibly obtain. In many of them, as in larceny, neither the protection of public morals nor of the witness could possibly warrant the exclusion of the public. To deny defendants a public trial under such circumstances, because the complainant is a child under seventeen years of age, would not be justified.

I am therefore of the opinion that the proposed bill, if enacted, would be unconstitutional. If the bill were amended by striking out the words "or other crime involving moral turpitude," and inserting in place thereof the words "or other similar crimes," the bill, if enacted in that form, would, in my opinion, be constitutional.

TAXATION OF CORPORATIONS — INTERPRETATION OF STATUTE — "NET INCOME."

Under the Federal Revenue Act of 1921, "net losses," as defined by section 204, are not deductible from "gross income" under sections 233 and 234, but are deductible from "net income" as defined by section 232.

"Net income," as defined by G. L., c. 63, § 30, par. 5, as amended by St. 1922, c. 302, means, with the modifications there specified, the net income required to be returned to the Federal government before the deduction of any sum as an allowance for net losses, and such losses are therefore not deductible under the corporation tax laws.

To the Com-
missioner of
Corporations
and Taxation.
1923
March 24.

You request my opinion whether in determining "net income," as defined in G. L., c. 63, § 30, par. 5, as amended by St. 1922, c. 302, "net losses," as defined in section 204 of the Federal Revenue Act of 1921, are deductible.

G. L., c. 63, § 30, par. 5, as amended by St. 1922, c. 302, is as follows: —

5. "Net income," except as otherwise provided in sections thirty-four and thirty-nine, the net income for the taxable year as required to be returned by the corporation to the federal government under the federal revenue act of nineteen hundred and eighteen or the federal revenue act of nineteen hundred and twenty-one, whichever of said acts may be applicable, and, in the case of a domestic business corporation, such interest and dividends, not so required to be returned as net income, as would be taxable if received by an inhabitant of this commonwealth; less, both in the case of a domestic business corporation and of a foreign corporation, interest, so required to be returned, which is received upon bonds, notes and certificates of indebtedness of the United States.

"Net income" of a corporation is defined by section 232 of the Federal Revenue Act of 1921. Said section is as follows: —

That in the case of a corporation subject to the tax imposed by section 230 the term "net income" means the gross income as defined in section 233 less the deductions allowed by section 234, . . .

"Gross income" of a corporation is defined by section 233, and section 234 provides for the allowance of deductions to be made in computing the net income of a corporation.

Section 204 (b) of the Federal Revenue Act of 1921 is as follows: —

If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

Article 1602 of Regulations 62, 1922 edition, provides, in part, as follows: —

A taxpayer sustaining a "net loss" such as set forth in section 204, for any taxable year ending after December 31, 1920, may file a claim therefor with his return for the subsequent taxable year. . . . If the evidence furnished satisfies the Commissioner that the taxpayer has sustained a "net loss" the amount of such net loss may be deducted from the net income of the taxpayer for the succeeding taxable year and if such net loss is in excess of the net income for such succeeding taxable year the amount of such excess shall be carried over and credited against the net income for the next succeeding taxable year.

It is, in my opinion, plain that "net losses," allowed as a deduction by section 204, paragraph (b), are deducted not from the gross income but from the net income, and that "net income," as defined by section 232, includes no deduction for such net losses. The net income, therefore, which is referred to in G. L., c. 63, § 30, par. 5, as amended by St. 1922, c. 302, is the net income which is required to

be returned by the corporation to the Federal government under the Federal Revenue Acts before the deduction of any sum as an allowance for net losses.

CONSTITUTIONAL LAW — JURISDICTION OVER NON-RESIDENTS — OPERATION OF MOTOR VEHICLES WITHIN THE COMMONWEALTH BY NON-RESIDENTS.

A statute providing that the operation of a motor vehicle within the Commonwealth by a non-resident shall be deemed equivalent to an appointment of the Registrar of Motor Vehicles as an attorney upon whom service of process may be made in any action growing out of an accident or collision in which such non-resident may be involved while operating a motor vehicle within the Commonwealth, would be constitutional.

To the Joint
Committee on
the Judiciary.
1923
March 26.

You have asked my opinion as to whether a proposed law, entitled "An Act further regulating the right of non-residents to operate motor vehicles within the Commonwealth," would be constitutional.

The proposed act provides, in substance, that the operating of a motor vehicle within the Commonwealth by a non-resident shall be deemed equivalent to an appointment by such non-resident of the Registrar of Motor Vehicles as an attorney upon whom service of process may be made in any action growing out of an accident or collision in which such non-resident may be involved while operating a motor vehicle within the Commonwealth.

In the case of *Kane v. New Jersey*, 242 U. S. 160, decided in 1916, the Supreme Court of the United States held constitutional a provision of a New Jersey statute regulating the operation of motor vehicles which provided that a non-resident owner of a motor vehicle must file with the Secretary of State an instrument constituting the Secretary of State an attorney upon whom process might be served in any action caused by the operation of such motor vehicle within the State. In delivering the opinion of the court Mr. Justice Brandeis said: —

We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the Legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the State, any financial liability of nonresident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law. On the contrary, it puts nonresident owners upon an equality with resident owners.

The proposed act differs from the New Jersey statute with regard to the feature under consideration in two respects only, — first, in that it does not provide for the actual filing of a power of attorney by non-resident operators, but declares that the operation of a motor vehicle within the Commonwealth by a non-resident shall be deemed the equivalent of such action by him; and second, in that it applies to any non-resident operating a motor vehicle within the Commonwealth, irrespective of whether or not he is the owner thereof.

In the case of foreign corporations doing business within a State it has been repeatedly held that they have thereby consented to be sued in the courts of that State upon causes of action arising out of the business done by them within its borders. This is irrespective of whether there was any actual consent by them to such jurisdiction, and irrespective also of whether the particular statute involved required the filing of a power of attorney by the corporation or merely declared that doing business within the State should be deemed equivalent to the filing of such an instrument. *Lafayette Ins. Co. v. French*, 18 How. 404. It would seem no more difficult to apply this doctrine of implied consent to an individual non-resident than to a foreign corporation. The reasoning of the Supreme Court in *Kane v. New Jersey*, *supra*, does not suggest that the constitutionality of the provision in the New Jersey statute depended in any way upon the fact that it did not include all non-residents operat-

ing a motor vehicle upon the highways of the State, but was restricted to non-resident owners.

I am accordingly of the opinion that the proposed act, if enacted into law, would be constitutional.

STATE EMPLOYEE — REMOVAL — HEARING — VETERAN AT
STATE INFIRMARY — CIVIL SERVICE.

The services of a State employee who is a veteran, but whose employment has not been approved by the board of trustees of the State Infirmary as required by G. L., c. 122, § 1, and who is not employed as the result of an appointment under civil service provisions, may legally be discontinued without hearing.

To the Com-
missioner of
Public Welfare.
1923
March 27.
—

My opinion has been requested as to whether or not the superintendent of the State Infirmary has the right to discontinue the services of an individual who is a veteran, whose employment has not yet been approved by the board of trustees of the infirmary, as required by G. L., c. 122, § 1, and who is not employed as the result of an appointment under civil service provisions.

G. L., c. 122, § 1, provides, in part, as follows: —

The trustees (of the state infirmary) shall appoint a superintendent of the state infirmary . . . All other officers and employees shall be appointed by the superintendent subject to the approval of the trustees, who shall fix the compensation in each case.

Not having received the approval of the trustees under this section, the man in question may be removed without a hearing unless he comes within the provisions of G. L., c. 31, § 26, which, so far as pertinent to the present question, reads as follows: —

No veteran holding office or employment in the public service of the commonwealth . . . shall be removed . . . except after a full hearing of which he shall have at least seventy-two hours' written notice, with a statement of the reasons for the contemplated removal. . . . The hearing in case of a state employee shall be before the board of conciliation and arbitration, . . .

From the information furnished me it does not appear that the man in question has passed the civil service examination or applied as a veteran for appointment without an examination; and he was not appointed under the civil service provisions relating to veterans.

The statute referred to, G. L., c. 31, § 26, was designed to protect only those persons who were appointed under the civil service law as veterans. As was said by Morton, J., in *Ayers v. Hatch*, 175 Mass. 489, 490: —

It (the statute) was intended to prevent the removal or suspension or transfer without his assent and without a full hearing of a veteran who had been appointed under the statutes and rules relating to the civil service.

The fact that the employee in the case at hand happens to be a veteran does not bring him within the protection of the statute. *Bates v. Selectmen of Westfield*, 222 Mass. 296.

Accordingly, in my opinion, the employment of the man in question may be discontinued without a hearing.

TAXATION — TAX ON MOTOR VEHICLES.

A statute purporting to impose an excise tax on motor vehicles, measuring the tax by a percentage of their list prices and exempting them from local property taxation, would be unconstitutional because the tax in its essence would be a tax upon the mere ownership of property, which would not be proportional.

You have submitted for my consideration a proposed bill, set out in Appendix W of House Document No. 1240, entitled "An Act to provide an excise tax on motor vehicles." The bill contains provisions material to the present inquiry as follows: It provides by section 7 for the levying of excises on motor vehicles owned or controlled by inhabitants of the Commonwealth or by persons or partnerships having a regular place of abode or business therein, or used therein in the business of corporations, measured by a percentage of the makers' list prices of such motor vehicles, to be paid to

To the House
Committee on
Taxation.
1923
April 2.

the treasurer of each city and the clerk of each town. By section 2 payment of such excise is required to be made before the motor vehicle can be registered. In section 1 the excise is said to be in lieu of a local property tax, and motor vehicles with respect to which the excise has been paid are exempt from taxation under G. L., c. 59. The bill provides in section 8 that moneys received from such excises shall be used for the general purposes of the city or town. You ask my opinion whether the proposed bill would be constitutional.

To be constitutional the bill must be based on the right to exercise one of the two following powers granted to the General Court by Mass. Const., c. I, § I, art. IV: —

. . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; . . .

The provisions of the bill show that it is not intended thereby to lay a tax upon property within the first of the two clauses quoted. Regarded as a tax on property, the proposed tax would clearly be invalid because not proportional. It would not be proportional because it would be imposed upon certain property at a rate different from that at which other property in the Commonwealth is taxed. *Portland Bank v. Apthorp*, 12 Mass. 252, 255; *Oliver v. Washington Mills*, 11 Allen, 268, 275; *Gleason v. McKay*, 134 Mass. 419, 423, 424; *Opinion of the Justices*, 195 Mass. 607; *Opinion of the Justices*, 208 Mass. 616, 618; *Opinion of the Justices*, 220 Mass. 613, 620–623.

The bill would therefore be unconstitutional unless it could be supported as an exercise of the power granted by the second clause, “to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and

commodities, whatsoever, brought into, produced, manufactured, or being within" the Commonwealth.

The question of the meaning and application of this clause was carefully considered by the justices in *Opinion of the Justices*, 196 Mass. 603, and their opinions were divergent. The chief justice and two associate justices in their opinion said (p. 622): —

The power to levy excise taxes has been much restricted by our Constitution. Such taxes can no longer be levied upon the mere ownership of property. Taxation upon property is provided for in the earlier clause of the Constitution, and it must be proportional upon all property alike. Excise taxes upon "produce, goods, wares or merchandise" can be imposed only when these articles are introduced, produced, manufactured, sold or used in a way of which the State may take cognizance, as having some relation to the government or affecting the public interests.

Three of the other justices thought that the power was broader, including the laying of imposts on domestic goods as property. Holding this view, they reached an opposite conclusion on the question submitted to them. The present chief justice, in a separate opinion, agreed with that conclusion; but with respect to the extent of the application of the clause under consideration he evidently was in agreement with the opinion expressed in the quotation above. His view on that matter is made plain in more recent opinions to which reference is hereinafter made.

The question has been considered in other cases. In *Portland Bank v. Apthorp*, 12 Mass. 252, 256, the court said: —

The term *excise* is of very general signification, meaning tribute, custom, tax, tollage, or assessment. It is limited, in our Constitution, as to its operation, to produce, goods, wares, merchandise, and commodities. This last word will perhaps embrace everything, which may be a subject of taxation, and has been applied by our legislature, from the earliest practice under the Constitution, to the privilege of using particular branches of business or employment, as, the business of an auctioneer, of an attorney, of a tavern-keeper, of a retailer of spirituous liquors, &c.

Again, in *Minot v. Winthrop*, 162 Mass. 113, 119, the court said:—

The excises to which the inhabitants of the Province of Massachusetts Bay were accustomed were taxes in the nature of license fees for carrying on certain kinds of business, taxes on the sale of goods, wares, and merchandise, such as intoxicating liquors, tea, coffee, and chocolate, china ware, etc., and stamp taxes on legal papers. The words “produce, goods, wares, merchandise . . . brought into, produced, manufactured, or being” within the Commonwealth, are words of definite meaning . . .

In *Opinion of the Justices*, 195 Mass. 607, 611, 612, an opinion was requested whether a statute providing for a uniform tax of three mills in each dollar of the cash valuation of certain enumerated classes of intangible personal property and exempting such property from all other taxation, State and local, would be within the constitutional power of the General Court. The court answered the question in the negative. They held that the “mere right to own and hold property such as is referred to in the question cannot be made the subject of an excise tax.”

In *Opinion of the Justices*, 208 Mass. 616, 618, 619, the same principle was declared. The court stated:—

The authority to levy an excise tax does not include a right to tax the mere ownership or possession of personal property of every kind. Such a tax cannot be laid upon money in one's pocket, or on deposit in a bank, or on money at interest, or on credits of any kind.

The question whether a special tax may be laid upon a particular class of personal property seems to have been settled in *Opinion of the Justices*, 220 Mass. 613. In that case the justices were asked whether a statute which should attempt to impose an excise on incomes derived from intangible personal property and exempt such property from other taxation would be unconstitutional because not proportional. With respect to that inquiry the justices said (pp. 623, 624):—

Plainly it is laid as an excise. Such an imposition cannot be sustained under the clause of the Constitution relating to excises. A tax upon income from money on deposit or at interest, from bonds, notes or other debts due, and as dividends from stocks, coupled with exemption from all other taxation of the principal from which such income flows, is in substance and effect a tax upon the property from which it is derived. A tax upon the income of property is in reality a tax upon the property itself. Income derived from property is also property. Property by income produces its kind, that is, it produces property and not something different. It does not matter what name is employed. The character of the tax cannot be changed by calling it an excise and not a property tax. In its essence a tax upon income derived from property is a tax upon the property. This was decided after most elaborate consideration, with affluent citation of authorities, in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 581; *S. C.*, 158 U. S. 601. We do not need to review that ground or to re-state the arguments in its support. It follows that a tax upon such income is a property and not an excise tax. This point is covered also by *Opinion of the Justices*, touching the so-called three-mill tax, reported in 195 Mass. 607. We adhere to the principles there stated and to the conclusions there reached.

Shortly after the adoption of the Massachusetts Constitution a carriage tax was laid as an excise in Massachusetts. St. 1781, c. 17. A tax on carriages was also imposed by Congress, which was sustained in the case of *Hylton v. United States*, 3 Dall. 171, as a tax within the class of excises, duties and imposts, which, therefore, did not require apportionment. The reason why it was so regarded, however, was that it was not levied directly on property because of ownership thereof, but rather on the use of property. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 570-572; *S. C.*, 158 U. S. 601, 623-627; *Brushaber v. Union Pacific R.R. Co.*, 240 U. S. 1, 14.

I do not, of course, decide that an excise tax cannot be laid upon motor vehicles. The provisions in the present law requiring registration of motor vehicles and the payment of fees therefor (G. L., c. 90, §§ 33, 34) lay excise taxes. But the proposed tax, in my opinion, coupled with the exemption from other taxation, is in substance a tax upon property, and thus unconstitutional according to the

principles stated in the decisions to which I have referred. I must advise you, therefore, that, in my opinion, the proposed bill would be unconstitutional because the tax in its essence would be a tax on property and would not be proportional within the constitutional requirement.

LEGACY AND SUCCESSION TAX — INTERESTS OF NON-RESIDENT UNDER AGREEMENTS WITH MASSACHUSETTS CORPORATIONS.

Under G. L., c. 65, § 2, property passing by virtue of the exercise by will of a power of appointment derived from a disposition of property before September 1, 1907, is subject to a succession tax as property passing by the will of the donee of the power.

A gift of property to one for life and on his death to his executor, to be paid over as the life beneficiary shall by will direct, gives him a general power to appoint by will.

A general power of appointment is well executed, unless a contrary intention is shown, by a general residuary clause in the will of the donee of the power.

The obligation of a Massachusetts corporation on the death of a non-resident to pay over a sum of money, with accumulated interest, to his executor, where no trust was intended to be created and no right in any specific property passed by the will of the deceased, is not an interest in property belonging to a person not an inhabitant of the Commonwealth which is taxable under G. L., c. 65, § 1, as amended by St. 1922, c. 403.

Where a Massachusetts trust company receives a fund in trust to invest the principal in a general trust fund, and, after the death of a life beneficiary, to pay the principal sum and accumulations of income to his executor, to be paid and distributed as he should by will direct, by transferring a proportional part of the general fund or the value thereof in money at the option of the company, and the fund is invested accordingly, on the death of the life beneficiary, being a non-resident and leaving a will by which the power of appointment is exercised, the proportional interest passing thereby in Massachusetts real estate and mortgages, stock of national banks situated in Massachusetts and stock of Massachusetts corporations, in which the general trust fund was partly invested, was taxable as property belonging to a person not an inhabitant of the Commonwealth, under G. L., c. 65, § 1, as amended by St. 1922, c. 403.

Under certain instruments executed by the New England Trust Company and by the Massachusetts Hospital Life Insurance Company, prior to September 1, 1907, income was payable to a woman for life and principal was to be distributed after her death to her executors or administrators. She died a non-resident of the Commonwealth, after St.

1922, c. 403, took effect, leaving a will, as I am informed, by which her interest in said principal sums was disposed of.

The agreements with the New England Trust Company were each entitled "Agreement of Trust" and acknowledged the receipt of a principal sum, which the company agreed to manage as a trust fund to be invested with other funds held upon other trusts. The company agreed to pay to the beneficiary named her proportional share of the income for life, and sixty days after her decease to pay the principal sum and unpaid accumulations of income to her executor, to be paid and distributed as she should by will direct, or to her administrator, "by transferring a just and proportional part of the general fund, or the value thereof in money, to be ascertained and fixed by the directors, at the option of the company."

The agreements with the Massachusetts Hospital Life Insurance Company were each entitled "Annuity in Trust," and acknowledged the receipt of a principal sum, which the company agreed to invest. The company agreed to ascertain the income from all property in its possession and, after deducting expenses and losses, to apportion the net income pro rata and to pay to the beneficiary her proportion of the income during her life, with provisions that payment should be for her separate use, and that the right to receive the principal sum and interest should be inalienable and not subject to the claims of creditors; and the company agreed in sixty days after proof of the decease of the beneficiary to pay the amount of the principal sum and accumulations of interest to the executors or administrators of the beneficiary.

The general fund of the New England Trust Company at the date of the death of the deceased non-resident, of which the deposits referred to constituted a part, was invested in part in Massachusetts real estate, in part in mortgages of Massachusetts real estate, in part in stock of national banks situated in Massachusetts, and in part in stock of Massachusetts corporations. The general fund of the

Massachusetts Hospital Life Insurance Company was also invested in part in each of the above-named four classes of property.

You ask my opinion whether, under these circumstances, real estate or any interest in real estate within this Commonwealth, or stock of Massachusetts corporations or of national banks, belonged to the deceased non-resident at the date of her death so as to be subject to inheritance tax under G. L., c. 65, § 1, as amended by St. 1922, c. 403.

Said section, as amended, is as follows:—

All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth or any interest therein and all stock in any national bank situated in this commonwealth or in any corporation organized under the laws of this commonwealth belonging to persons who are not inhabitants of the commonwealth, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

1. G. L., c. 65, § 2, provides, in part, as follows:—

Whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; . . .

Under this section it is clear that property passing by virtue of the exercise by will of a power of appointment derived from a disposition of property before September 1, 1907, is taxable under G. L., c. 65, § 1, as amended, as property passing by the will of the donee of the power. *Minot v. Treasurer and Receiver General*, 207 Mass. 588.

2. It may be questioned whether a gift of property to one for life and on his death to his executor gives to the life beneficiary a power of appointment. No particular form of words need be used to confer a power of appointment. If the instrument shows an intention to give a power of appointment, one will be implied. It is a necessary inference that a power of appointment is intended by a gift of a remainder after a life estate to the life tenant's executor, since the right to provide by will for the passing of another's property is, in fact, a power of appointment. In the instrument executed by the New England Trust Company the intention is made plain by the further provision that the principal is to be paid and distributed as the beneficiary shall by will direct. *Bowen v. Dean*, 110 Mass. 438; *Todd v. Sawyer*, 147 Mass. 570; *Sands v. Old Colony Trust Co.*, 195 Mass. 575. The deceased had, therefore, a general power to appoint by will.

I am informed that the will of the deceased contains specific and pecuniary legacies for the satisfaction of which her own estate is ample, and a general residuary clause by which the remainder of her estate is given in trust for the benefit of her children and their issue. The will indicates an intention that the property passing to the trustees shall include the principal sums invested with the New England Trust Company and the Massachusetts Hospital Life Insurance Company. It is settled that a general power of appointment is well executed, in the absence of anything to show a contrary intention, by a general residuary clause in the will of the donee of the power. *Stone v. Forbes*, 189 Mass. 163; *Howland v. Parker*, 200 Mass. 204, 207; *Shattuck v. Burrage*, 229 Mass. 448, 450. In my opinion, there-

fore, the property payable to the executors under the instruments passed by virtue of an exercise of the power of appointment belonging to the deceased.

3. It follows that if the property passing under the instruments by virtue of the exercise of the power of appointment is properly such as is taxable under G. L., c. 65, § 1, as amended by St. 1922, c. 403, when passing by the will of a non-resident, then that property is subject to tax. Whether it is such property depends upon the nature of the obligations under the instruments of the respective companies arising upon the death of the life beneficiary.

By the terms of the "Annuity in Trust" executed by the Massachusetts Hospital Life Insurance Company the obligation of that company on the death of the life beneficiary is merely to pay over the principal sum deposited, with accumulations of interest, and is not to distribute any portion of any trust fund. It is true that the return to the life beneficiary is computed by a pro rata apportionment of income received from all the property of the company, and that there are provisions with respect to the receipt of principal and income similar to those found in cases of so-called "spendthrift" trusts. But, on the other hand, there is no provision that the company shall receive, hold and invest the principal upon trust, the return to the beneficiary is denominated "interest," and the obligation of the company on the death of the life beneficiary is not to pay over the principal with all increment which may have accrued to it, but merely to pay over the amount of the principal sum with accumulations of interest. Furthermore, the company is not empowered to do the business of a trustee, but is empowered to make all kinds of contracts in which the casualties of life and interest of money are principally involved. See St. 1818, c. 130, § 6. These facts, in my opinion, show clearly that a trust was not intended to be created, that there was no trust *res* to which a trust could attach, and that no right in any specific property passed by the will of

the deceased. See *Foley v. Hill*, 2 H. L. Cas. 28; *Pratt v. Tuttle*, 136 Mass. 233.

The "Agreement of Trust" executed by the New England Trust Company, on the other hand, purports to create a trust. The principal is referred to as a trust fund, and the company agrees to pay the income to the life beneficiary, and on her decease to pay the principal and unpaid accumulations of income to her executor. It is provided that the company may invest the principal with other funds, and you state that in the present instance the principal was invested in its general trust fund. There is also a provision that on the termination of the trust the company may pay the principal fund by transferring a just and proportional part of the general fund or the value thereof in money. The amount to be paid over is not the amount of the principal when deposited, with accumulations of income, but includes any increment or loss which may have accrued upon the investment of the principal with the general fund. The company by its charter (St. 1869, c. 182, § 3) was expressly given the power to receive and hold moneys or property in trust. The principal seems to have been deposited with the intention of establishing a trust, and the instrument should be construed as providing for the passing by the will of the deceased of rights in specific property in which the principal was invested, unless some difficulty is presented by the provisions for the deposit of the principal in a general trust fund and the provision that the principal may be paid over in money at the election of the company.

4. There can be no doubt of the general principle that trustees should not ordinarily mingle funds of different trusts in one investment. *McCullough v. McCullough*, 44 N. J. Eq. 313, 316; *Perry on Trusts*, 6th ed., § 463. But, on the other hand, where the parties to the creation of trusts have indicated an intention that the funds of the trusts shall be mingled, the trusts are not thereby defeated. See *Parkhurst v. Ginn*, 228 Mass. 159. Cf. *Lowe v. Jones*,

192 Mass. 94. The trust *res* in such a case is the whole trust fund, which is to be administered in such a way as to execute all trusts to which it is subject.

5. The provision that the principal fund may be paid over by transfer of a part of the general fund or the value thereof in money, in my opinion, does not make the obligation of the company a debt rather than a trust obligation to distribute specific property. It is a mere provision for an accounting by the trustee. See *Davis v. Colburn*, 128 Mass. 377; *Cathaway v. Bowles*, 136 Mass. 54; *Upham v. Draper*, 157 Mass. 292. Prior to such settlement, in my opinion, under this instrument there is a proportional interest in the general trust fund passing by virtue of the power.

6. I am therefore of the opinion that an interest in the fund of the New England Trust Company, by virtue of the instruments executed with that company, passed under the will of the deceased non-resident, and is subject to tax; but that no taxable interest passed in the funds of the Massachusetts Hospital Life Insurance Company.

EXTRADITION — FUGITIVE FROM JUSTICE — PHYSICAL PRESENCE — MOTIVE.

Before the Governor of an asylum State can lawfully comply with the demand for extradition, he must find as a fact that the accused is a fugitive from justice. Physical presence in the demanding State at the time of the commission of the offence is necessary to constitute one a fugitive from justice.

The accused cannot be surrendered upon a theory of constructive presence.

The motive of the accused in leaving the demanding State is immaterial.

To constitute one a fugitive from justice it is not necessary that he should have done within the demanding State every act necessary to complete the crime.

To the
Governor.
1923
April 9.

You have referred to this department for examination and report a requisition of the Governor of Connecticut, with accompanying papers, for the arrest and extradition of one _____, hereinafter called the defendant, an alleged fugitive from justice charged with the crime of manslaughter.

The complaint accompanying the requisition charged, in substance, that the defendant was president and treasurer of a corporation which conducted a moving picture theatre in the city of New Haven; that on or about June 1, 1921, the defendant ordered certain alterations and installations made in the building; that these alterations and installations were made in violation of the local ordinances; that on November 27, 1921, the defendant, knowing that the alterations were not made in accordance with the local ordinances, and knowing that the use of the building in its then condition was dangerous and unlawful, because of non-compliance with the ordinances, did, by his agents, give a public show in the theatre; and that fire occurred, and a member of the audience was fatally burned and died two days thereafter.

The facts as agreed upon are as follows: —

The defendant, during the whole of the time in question, was and still is a resident of the Commonwealth of Massachusetts, and was president and treasurer of a corporation which operated a theatre in New Haven. On or about June 1, 1921, the defendant was physically present in New Haven, and personally ordered that alterations and installations be made in the building. These alterations and installations were made *after* the defendant left Connecticut and while he was in Massachusetts. After the completion of the alterations and installations, the defendant was again in New Haven, during the month of August, 1921, and was in the theatre but did not inspect the alterations or installations. The theatre was used from that time up to and including November 27, 1921, when a fire occurred on the stage, made rapid progress throughout the building and destroyed it. A member of the audience was fatally burned and died as a result of his injuries shortly thereafter. It was conceded that the defendant was not physically present in New Haven on November 27, 1921, and that he was in New Haven only on or about June 1, 1921, and once during the month of August, 1921.

The State of Connecticut contends that the alterations and installations were made "in accordance with his general directions." The coroner for the County of New Haven, who held an inquest at the time, made a finding that a conference was held in New Haven on May 30, 1921, between

the defendant, an agent of the corporation and a contractor; that at the conference "no definite plan was fixed upon" but that the defendant authorized his agent and the contractor to take the necessary steps for making the alterations, "leaving the practical details to their judgment"; and that the defendant directed the contractor "to take the necessary action with the building inspector to bring the proposed changes within his approval."

In the light of the view subsequently expressed, the question whether the alterations and installations were made in accordance with the defendant's general directions or were made as the coroner found the facts becomes immaterial.

The chief issue is whether or not the defendant is a fugitive from justice. U. S. Const., art. IV, § 2, provides that a person charged in any State with crime, who shall *flee* from justice, and be found in another State, shall, on demand, be delivered up to the State having jurisdiction of the crime. This provision of the Constitution is not self-executing, and requires the action of Congress in that regard. *Kentucky v. Dennison*, 24 How. 66, 104; *Hyatt v. Corkran*, 188 U. S. 691, 708. Congress did enact a statute, U. S. R. S., 1901, § 5278 (Comp. Stat. of U. S., 1916, § 10126), which provides, in part:—

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory *from whence the person so charged has fled*, it shall be the duty of the executive authority of the State or Territory *to which such person has fled* to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. . . .

Before the governor of the asylum State can lawfully comply with the demand for extradition he must find as a fact that the accused is a fugitive from justice. *Duddy's Case*, 219 Mass. 548, 550; *Ex parte Reggel*, 114 U. S. 642; *Roberts v. Reilly*, 116 U. S. 80; *Hyatt v. Corkran*, 188 U. S. 691. It is well established that the accused cannot be considered a fugitive from justice if he was not physically within the demanding State at the time of the commission of the alleged offence. He cannot properly be surrendered upon the theory of a constructive presence. *Duddy's Case*, 219 Mass. 548; *Hyatt v. Corkran*, 188 U. S. 691; *Appleyard v. Massachusetts*, 203 U. S. 222; *McNichols v. Pease*, 207 U. S. 100; *Strassheim v. Daily*, 221 U. S. 280. To be a fugitive from justice it is not necessary that the accused should have left the demanding State with intent to flee from its justice. If he was in the demanding State at the time the offence was committed, and thereafter left, no matter for what purpose or with what motive nor under what belief, he is a fugitive from the justice of that State. *Appleyard v. Massachusetts*, 203 U. S. 222; *McNichols v. Pease*, 207 U. S. 100; *Bassing v. Cady*, 208 U. S. 386. Nor is it necessary that the accused should have done within the State every act necessary to complete the crime.

In *Strassheim v. Daily*, 221 U. S. 280, 285, the court said: —

We think it plain that the criminal need not do within the State every act necessary to complete the crime. If he does there an overt act *which is and is intended to be a material step toward accomplishing the crime*, and then absents himself from the State and does the rest elsewhere, he becomes a fugitive from justice, when the crime is complete, if not before. *In re Cook*, 49 Fed. Rep. 833, 843, 844. *Ex parte Hoffstot*, 180 Fed. Rep. 240, 243. *In re William Sultan*, 115 No. Car. 57. For all that is necessary to convert a criminal under the laws of a State into a fugitive from justice is that he should have left the State after having incurred guilt there, *Roberts v. Reilly*, 116 U. S. 80, and his overt act becomes retrospectively guilty when the contemplated result ensues.

See also, *Taft v. Lord*, 92 Conn. 539.

It is conceded that the defendant was not in Connecticut on November 27, 1921, the date when the crime of manslaughter is alleged to have been committed. He cannot, therefore, be considered a fugitive from justice unless his act in ordering the alterations and installations on or about June 1, 1921, or his presence in the theatre in August without inspecting the alterations or installations, or both, constituted an overt act which was, and was intended to be, a material step toward accomplishing the crime of manslaughter.

It is nowhere suggested that the defendant caused the fire to be set, or contemplated on the occasion of either of his visits to New Haven that a fire should be started. The complaint does not so charge or intimate. There is no direct causal connection between the violation of the local ordinances and the death of a spectator at the theatre. The death was neither a natural nor a probable consequence of such violation. It was caused by fire, for which the defendant was not responsible, and at a time when the defendant was not in New Haven and was not personally operating the theatre. The defendant's order to make alterations and installations in the building, even if they were made in violation of the local ordinances, was not a material step in the commission of the crime of manslaughter.

Gross misconduct, gross negligence and wilful and unlawful neglect of duty on the part of the defendant lie at the foundation of the charge of manslaughter against him. The fact, if it be a fact, that he violated the city ordinances is proper evidence on the question of negligence, but is not in itself one of the acts "which was, or was intended to be, a material step in accomplishing the crime" of manslaughter. *Commonwealth v. Adams*, 114 Mass. 323; *Commonwealth v. Hawkins*, 157 Mass. 551.

I am therefore of the opinion that the defendant was not in the State of Connecticut at the time of the commission of the crime of manslaughter, that he did not do any act

within that State which was a material step in accomplishing that crime, that he therefore is not a fugitive from justice, and that the request of the Governor of Connecticut for his extradition should be refused.

On April 12, 1923, in compliance with an order adopted by the House of Representatives, the Attorney-General rendered an advisory opinion concerning the then status of the litigation involving the validity of the national bank tax, concerning the then status of the remedial legislation pending in Congress, and gave advice as to whether, providing there was no change in the situation as it then existed, there was any legal bar to the collection of the national bank tax for 1923, and as to what was being done to protect the interests of the Commonwealth and of the cities and towns therein, and what further action, if any, was desirable. As the advisory opinion was printed as House Document No. 1441 of 1923, it is therefore not reprinted here.

JUSTICE OF THE PEACE — NOTARY PUBLIC — RESIDENCE IN MASSACHUSETTS.

A person is ineligible for appointment as a justice of the peace or a notary public for Massachusetts unless he is a legal resident of Massachusetts.

You have requested my opinion as to whether a person whose legal residence is outside of the Commonwealth may be appointed a notary public or a justice of the peace for Massachusetts.

To the
Governor.
1923
April 20.

The office of justice of the peace is one provided for in the Constitution (c. II, art. III; c. II, art. IX). It is a judicial office. *Opinion of the Justices*, 107 Mass. 604.

Mass. Const. Amend. IV provides that "notaries public shall be appointed by the governor in the same manner as judicial officers are appointed." See *Opinion of the Justices*, 165 Mass. 599.

It would seem, with respect to the question of the neces-

sity of residence within Massachusetts, that both offices stand upon the same footing as that, for example, of justices of the Supreme Court. No express requirement exists in the case of judicial officers that they must be residents or citizens of Massachusetts. That such a constitutional qualification is to be found by implication, however, would hardly seem to admit of doubt. It can scarcely be questioned, I think, that the constitutional offices of the Commonwealth have always been and still are open solely to its own citizens.

Article IX of the Declaration of Rights declares that "all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers and to be elected, for public employments." In Mass. Const., c. I, § II, art. II, occur these words:—

And to remove all doubts concerning the meaning of the word "inhabitant" in this constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this state, in that town, district, or plantation where he dwelleth, or hath his home.

In commenting upon the significance of these declarations the Supreme Judicial Court has said (*Opinions of the Justices*, 240 Mass. 601, 608):—

The words "inhabitants" and "inhabitant" as thus used mean "citizens" and "citizen." All others who are not citizens are excluded from the scope of the meaning of those words. The words "inhabitants" and "inhabitant" have this meaning wherever used in the Constitution to describe the right to vote or to be elected to office. . . .

From the express provision that none except "male inhabitants" or "male citizens" possessed the right to vote under the Constitution as well as from unbroken usage, arose the implication that men alone were eligible for election or appointment to offices created or recognized by the Constitution. . . . When the fundamental law is silent as to the qualifications for office, it commonly is understood that electors and electors alone are eligible. *Cooley*, Cons. Law (3rd. ed.), 285. *State v. Smith*, 14 Wis. 497. *Attorney General v. Abbott*, 121 Mich. 540. *State v. Van*

Beek, 87 Iowa, 569, 577. Except in the particulars already pointed out wherein definite qualifications are established as conditions of eligibility for office, there has been, under the Massachusetts Constitution and under Massachusetts custom equality among qualified voters as to eligibility for such offices as are recognized or created by the Constitution.

In my opinion, therefore, a person is ineligible for appointment as a justice of the peace or a notary public for Massachusetts unless he is an inhabitant, *i.e.*, a resident of Massachusetts; and the residence necessary for this purpose is the same as that necessary for citizenship, namely, a legal residence in the sense of a domicile in Massachusetts.

CONSTITUTIONAL LAW — AN ACT TO ASCERTAIN THE WILL
OF THE PEOPLE — EIGHTEENTH AMENDMENT — PUBLIC
MONEY.

An act to ascertain the will of the people with reference to the Eighteenth Amendment to the Constitution of the United States, known as the "prohibition" amendment, and with reference to the Federal statute known as the "Volstead act," would be constitutional.

Public money can be expended only for a public purpose.

The erection of town houses in which the inhabitants may assemble has been uniformly held to be a public purpose.

The right of the people peaceably to assemble and to discuss public topics is not confined to public meetings.

You have requested my opinion as to the constitutionality of House Bill No. 314, entitled "An Act to ascertain the will of the people of Massachusetts with reference to the Eighteenth Amendment to the Constitution of the United States and the enforcement thereof," which reads as follows: —

To the House
Committee on
Bills in the
Third Reading.
1923
April 26.

SECTION 1. There shall be submitted to the voters of each congressional district in the commonwealth at the next regular state election two questions which shall be printed in the following form on the official ballot to be used at such election: —

1. Shall the senators from this commonwealth and the representative in congress from this district be requested to support a constitutional amendment to repeal the eighteenth amendment to the constitution of the United States known as the "prohibition" amendment?

2. Shall the senators from this commonwealth and the representative in congress from this district be requested to support amendments of the federal statute known as the "Volstead act," in order to make legal the manufacture, transportation and sale of beer and wines having a limited alcoholic content?

SECTION 2. The secretary of the commonwealth shall tabulate the returns of votes upon the aforesaid questions, and shall transmit copies of such returns by congressional districts to each senator and representative in congress from this commonwealth. The vote under this act shall not be regarded as an instruction to said senators and representatives in congress, but shall be regarded as an expression of the opinion and will of the people of the several congressional districts of this commonwealth upon said questions.

By Mass. Const., c. I, § 1, art. IV, the Legislature is given full power and authority to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, not repugnant or contrary to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth. See also *Stoughton v. Baker*, 4 Mass. 522, 529; *Commonwealth v. Alger*, 7 Cush. 53, 101.

Is the proposed act repugnant or contrary to the Constitution? Manifestly the bill, if enacted, will involve an expenditure of public money for printing the questions on the ballot and tabulating the returns of votes. Public money can be expended only for a public purpose. *Lowell v. Boston*, 111 Mass. 454, *Mead v. Acton*, 139 Mass. 341; *Wheelock v. Lowell*, 196 Mass. 220; *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371; *Whittaker v. Salem*, 216 Mass. 483; *Duffy v. Treasurer and Receiver General*, 234 Mass. 42, 50. Unless the purpose of ascertaining the will of the people upon the proposed questions is a public purpose, the proposed bill, if enacted, would be unconstitutional.

Article XIX of the Declaration of Rights provides:—

The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their

representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

This has always been regarded as one of the most valuable rights of the people.

Article XLVIII, II. *Initiative Petitions*, § 2, provides that the right of peaceable assembly shall not be the subject of an initiative or referendum petition. The First Amendment of the Constitution of the United States provides, in part, that Congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Referring to article XIX of the Declaration of Rights, the court said, in *Commonwealth v. Porter*, 1 Gray, 476, 477: —

This is recognized as a valuable right secured to the people by the constitution. . . .

This, like the similar declarations of other rights, essential to a free government, is expressed in general terms; but it not only gives authority to the legislature, but makes it their bounden duty, to make suitable laws from time to time, as the exigencies of the times may require, for the protection and enjoyment of such rights.

. . . Nothing more concerns the public good, than the election of good men, in all respects qualified, to public offices. The extended and almost unlimited rights of suffrage, secured to the people of this commonwealth by the constitution and laws, assume and are founded on the right of voters, to have the fullest and freest discussion and consultation upon the merits and qualifications of candidates, for their information and the means of exercising a sound and enlightened judgment in regard to public men and political measures.

See also *Whelock v. Lowell*, 196 Mass. 220, 225.

In *Fuller v. Mayor of Medford*, 224 Mass. 176, 178, the court said: —

The purpose (of article XIX of the Declaration of Rights) in general is to enable the voters to have full and free discussion and consultation upon the merits of candidates for public office and of measures proposed in the public interests. Its importance in this respect is of the highest moment.

The erection of town houses in which the inhabitants may assemble has been uniformly held to be a public purpose, for which public money might legally be expended. *Whelock v. Lowell*, 196 Mass. 220, and cases there cited. At page 227 the court said: —

It is hard to overestimate the historic significance and patriotic influence of the public meetings held in all the towns of Massachusetts before and during the Revolution. No small part of the capacity for honest and efficient local government manifested by the people of this Commonwealth has been due to the training of citizens in the forum of the town meeting. The jealous care to preserve the means for exercising the right of assembling for discussion of public topics manifested in city charters by the representatives of the people, whenever providing for the transition from the town meeting to the city form of local government, demonstrates that a vital appreciation of the importance of the opportunity to exercise the right still survives. The practical instruction of the citizen in affairs of government through the instrumentality of public meetings and face to face discussions may be regarded quite as important as their amusement, edification or assumed temporal advancement in ways heretofore expressly authorized by statute and held constitutional. *Hubbard v. Taunton*, 140 Mass. 467. *Morrison v. Lawrence*, 98 Mass. 219. *Kittredge v. North Brookfield*, 138 Mass. 286. *Commonwealth v. Williamstown*, 156 Mass. 70. *Kingman v. Brockton*, 153 Mass. 255. *Attorney General v. Williams*, 174 Mass. 476.

It is only by a continuance of intelligent, persistent and honest interest in the cause of good government on the part of the great majority of citizens that the permanency of our institutions can be secured. Only by the abiding constancy of such interest will intelligence triumph over impulse and indifference in public affairs. In no other way can a government by free men continue, which shall in fact preserve the blessings of liberty.

The right of the people peaceably to assemble and to discuss public topics is not confined to public meetings. Where public meetings are inadequate for an expression of opinion, the voter may be given an opportunity to express his opinion through the medium of the ballot.

In *Fuller v. Mayor of Medford*, 224 Mass. 176, the charter of the city of Medford provided that any question of public interest, upon request in writing of twenty-five per cent

of the qualified voters, might be placed upon the official ballot for a municipal election for the purpose of ascertaining the will of the people. The court in that case said, at page 179:—

It may well have been thought that the machinery for the expression of an advisory opinion by the voters of a city at a public meeting was quite inadequate, in view of the inconvenience of gathering at a single hall a substantial proportion of the citizens, and that this should be supplemented by giving to any voter the privilege of expressing his view so that it would be counted. Advisory expressions of public opinion participated in by large numbers of people may have been deemed likely to be a sufficiently strong incentive to action by city officers. It is no idle form to secure a definite conception in this form of what the people think on any subject of general interest.

St. 1913, c. 819 (now G. L., c. 53, §§ 19–22), provides for the placing of questions of public policy upon the ballot, upon the fulfillment of certain requirements, for the purpose of instructing the members of the Legislature. St. 1920, c. 560 (now G. L., c. 53, § 18), provides for ascertaining the will of the people under certain circumstances upon the question whether the ratification of an amendment to the Federal Constitution is desirable, by placing such question upon the official ballot. Both of these acts indicate the general tendency of legislation to ascertain the will of the people through the medium of the ballot instead of through public meetings, in view of the inconvenience of the latter in many instances under present conditions.

The subject-matter of the questions to be submitted to the people under the proposed act is one of public interest, and affects the people generally. In *Commonwealth v. Porter*, 1 Gray, 476, 481 (1854), the court said:—

The present case is that of a meeting of citizens assembled in the meeting-house for the discussion of the subject of temperance. This is a subject of great public interest, and has, we know, attracted the earnest attention of the people of this commonwealth, especially with a view to legislative action. For aught that appears, this was a meeting of people, and a discussion of the subject of temperance, which actually resulted

in a petition or remonstrance to the legislature, with a view to ameliorate or alter, or to retain and confirm, the existing law upon the subject of temperance, and, as such, a meeting held in strict conformity to the right secured by the constitution.

The fact that the proposed act provides for an expression of opinion upon an amendment to the Federal Constitution and to a Federal statute does not affect or alter the situation, since the question is one of public interest affecting the inhabitants of this Commonwealth.

The Legislature has very frequently, through resolutions, memorialized Congress and urged it to enact or refrain from enacting legislation affecting the interests of the inhabitants of this Commonwealth, and has sent copies of such resolutions to each senator and representative in Congress from this Commonwealth. In recent years the following resolutions were adopted:

1920.

(1) Resolution protesting against the passage of a bill by Congress relative to the importation of lobsters.

(2) Resolution urging Congress to pass an act repealing and removing all restrictions imposed for the duration of the war on freedom of speech, freedom of the press, and the right of the people peaceably to assemble.

(3) Resolution requesting Congress to pass a bill authorizing the Secretary of Agriculture to establish a forest experiment station in the White Mountain National Forest.

(4) Resolution expressing the hope that the ratification of the woman's suffrage amendment to the Federal Constitution would not further be delayed, and that every effort would be made by the legislators of the six remaining States to ratify the amendment immediately.

(5) Resolution expressing the hope that Congress would pass a resolution deprecating any interference on the part of the United States in respect to controversies concerning the boundaries of Italy and prohibiting the use of Federal troops in territory claimed by Italy.

1921.

(1) Resolution stating that the General Court is in favor of the creation of a federal agency to regulate the production and price of coal.

(2) Resolution urging Congress to reject all measures which depart from or infringe upon the traditional policy of the preservation of national parks.

1922.

(1) Resolution urging the members of Congress from this Commonwealth to use their influence with the Federal government to secure the transfer, for repairs, to the Boston Navy Yard of the steamship "Leviathan," property of the Federal government.

(2) Resolution urging Congress to pass appropriate legislation to regulate further the use of narcotic drugs.

(3) Resolution urging the Senate of the United States to pass the Dyer Anti-Lynching Bill, so called.

(4) Resolution petitioning Congress to propose an amendment to the Federal Constitution which would give Congress the power to regulate the hours of labor of women and minors.

1923.

(1) Resolution favoring the passage by Congress of legislation placing an embargo on coal.

(2) Resolution urging Congress to enact legislation which would provide adjusted compensation for men and women who served in the Army, Navy and Marine Corps of the United States during the World War.

(3) Resolution favoring the passage of legislation to provide for the preservation and protection of public records, and for the erection of a fireproof building at Washington to serve as a repository of all national archives.

(4) Resolution entitled "In favor of a large proportion of funds for work at the Boston Navy Yard," which requested the Navy Department to assign a large share of the work of the department to the Boston Navy Yard.

In view of the foregoing, I am of the opinion that the expenditure of public money involved in the carrying of the proposed bill into effect would be a legal expenditure for a public purpose, and that the proposed bill, if enacted, would not be repugnant or contrary to the Constitution, and would be constitutional.

You have further requested my opinion whether the proposed bill, if enacted, would be constitutional if changed in section 1 by striking out all after the word "act" in line fourteen and inserting in place thereof the words "so changing its provisions, conformably to the Eighteenth Amendment to the Constitution of the United States, as to permit the manufacture, transportation and sale, for beverage purposes, of beer, wine and other beverages containing a greater percentage of alcohol than is at present permitted by said provisions." In my opinion, the proposed bill so changed, if enacted, would be constitutional.

PUBLIC WORK — CONTRACT WITH TWO OR MORE CORPORATIONS, ACTING JOINTLY — PARTNERSHIP.

A contract for public work may not legally be made by the Commonwealth with two or more corporations, acting jointly.

Two or more corporations may not enter into a partnership.

To the Commissioner of
Public Works.
1923
April 26.

You state that "the low bid on a contract was presented this week by the Alco Contracting Company, Inc., and the Middlesex Construction Company, Inc., as joint bidders. We have not previously had occasion to execute a contract under conditions where two corporations were appearing as partners, and are not sure that such an arrangement would be legal," — and ask me two questions: —

First: Can a contract legally be made between the Commonwealth and the Alco Contracting Company, Inc., and the Middlesex Construction Company, Inc., acting jointly as parties of the second part?

Second: If your reply to the first question is in the negative, can a

contract legally be made with either of said corporations under their joint proposal of April 17, 1923?

You further advise me that the board of directors of the Alco Contracting Company, Inc., on April 4, 1923, passed a vote, of which the following is a copy:—

At a meeting of the Board of Directors of Alco Contracting Co., Inc., held this fourth day of April, 1923, all of the directors being present, Mr. Paul Caputo, President, Matthew Cummings, Treasurer, Andrew Di Pietro, it was

Voted, That the Board of Directors be authorized to form a partnership with the Middlesex Construction Co., Inc., whenever in their judgment it is advisable in handling large contracts.

A true copy.

Attest: Matthew Cummings, Clerk.

Also that the directors of the Middlesex Construction Company, Inc., passed a similar vote.

I am further advised that in the proposal signed jointly by these companies the word "partnership" is not used; it being simply a proposal signed by both companies, presumably by the proper officer of each.

For reasons that will appear later, there seems to be no occasion for a precise and definite answer to your first question, but I deem it advisable to point out to you certain propositions of law in connection therewith.

"It is familiar law that a corporation cannot enter into a partnership" (*Williams v. Johnson*, 208 Mass. 544, 552), so that, if the entering into this contract generally by these corporations has the elements of a partnership, it may not legally be done, and such a contract would be *ultra vires*, and, if executed, unenforceable. Whether in this particular case it does amount to a partnership obligation, I am not called upon to decide; but I point out to you that apparently both companies felt they were entering into a partnership obligation, which is evidenced by the vote passed by each. Upon the facts in this particular case a court might well hold that the arrangement was a partnership matter, even

though for a temporary purpose, and *ultra vires*. See *Kelly v. Biddle*, 180 Mass. 147, and the comment on that decision in *Williams v. Johnson*, *supra*, p. 552.

There is some authority, however, holding that while a corporation may not enter into a partnership, it may enter into a joint venture. See Thompson on Contracts, 2d ed., § 2337; *Salem-Fairfield Telephone Association v. McMahon*, 78 Ore. 477.

But there is no Massachusetts decision taking this view, and the language of the court in *Williams v. Johnson*, *supra*, p. 552, would seem to indicate that the Massachusetts court would hold that such a contract as this came within the condemnation of the rule laid down in that case. In so far, therefore, as an answer to your first question is necessary in view of the circumstances which have since been called to my attention, I advise you that such a contract should not be entered into by any department of the Commonwealth, in view of the cases above cited.

I am further advised, however, that this particular bid is considered by your department as most advantageous to the Commonwealth; also, that one of the corporations involved is willing to waive any rights it may have in the bid and, so far as it may do so, assent to the awarding of the contract to the other corporation. I am also advised that this is a work in which it is not necessary, as a matter of law, for your department to advertise for bids; that it might award the contract without bids; and that it might reject all bids now and award the contract without calling for new ones. In the light of these facts, therefore, I come to the answer to your second question, and advise you that it would seem to rest within your sound discretion to grant this contract to one of the two corporations mentioned upon the terms as outlined in the proposal. In such case there should be a new proposal signed by the single company and, for the purposes of your record, a proper waiver by the other company of any right it may possibly have in the premises. In so deciding, I do not intend that any prece-

dent be established or any rule of law laid down as authority for such course in a situation where the contract is *required by law* to be let on competitive bids after advertisement.

CONSTITUTIONAL LAW — VENUE OF CRIMES —
JURISDICTION — VICINITY.

The word "vicinity," as used in Article XIII of the Declaration of Rights, is not synonymous with "county."

Common law courts have inherent power to order a change of venue to secure an impartial trial.

An act providing that a defendant shall not be discharged for want of jurisdiction if the prosecuting officer, before trial, petitions for leave to proceed, stating that he is in doubt as to the court's jurisdiction, and the court orders him to proceed, and the evidence at the trial discloses that the crime was committed without the county or territorial jurisdiction of the court, is constitutional.

You request me to consider House Bill No. 1419, entitled
"An Act relative to the venue of crimes in general."
Article XIII of the Declaration of Rights provides: —

To the
Governor.
1923
May 1.

In criminal prosecutions, the verification of facts, in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen.

The word "vicinity," as used in that article, is not synonymous with "county," nor is the article affirmative of the right of a citizen to be tried in any particular county.

In *Commonwealth v. Parker*, 2 Pick. 550, 553-554, the court said: —

The word *vicinity* is not technical, with a precise legal meaning, as the word *county* or the ancient word *visne*, vicinage, would be held to be.

And considering that the declaration of rights was framed by men well acquainted with the common law, as well as with the colonial and provincial regulations and practice of Massachusetts, we may well presume that the use of a common and popular, instead of a technical word, in this article of the declaration, was not accidental. The form in which the principle is expressed is also worthy of consideration. It is not prohibitory of a trial of an offence, in any other county than that in which it happened; nor is it affirmative of a right in the citizen to be tried in

any particular county. It is merely declaratory of the sense of the people, that the proof of facts in criminal prosecutions should be in the vicinity or neighbourhood where they happen. . . .

. . . It may be considered questionable whether those who framed the bill of rights intended to tie the hands of the legislature, with the history of parliamentary proceedings before them, from which they could perceive the expediency, if not the necessity, of leaving the legislature without any other restriction than that which would be derived from respect to the declared sense of the people, that trials in the vicinity were always desirable, when they could be had there without great inconvenience to the public. It must have been known also, that the principle of the common law limiting the trials of crimes to the county within which they were committed, had been necessarily departed from by our ancestors in the early history of the country; for all capital felonies were cognizable only in the Court of Assistants, which court held its sessions only in Boston for the whole colony, and it was expressly ordained that the jurors attending this court should be summoned from the counties of Suffolk and Middlesex; so that in whatever other county a capital offence was committed, it was necessarily tried in the county of Suffolk. *Vid. Ancient Charters and Col. Laws, &c., pp. 90, 144.*

After referring to several Colonial statutes, the court also said, at page 554:—

This being the state of things at the time of the adoption of the constitution, and the probable creation of new counties, whose population might not justify the sending of the Supreme Court into them, being probably foreseen, it may well be supposed that the wise men who framed the declaration of rights, when they proposed to the people to declare, that in "criminal trials, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty and property of the citizen," intended to hold out a caution to all future legislatures to regard this principle, in their laws concerning crimes and punishments, but not to prohibit them from causing trials to be had in adjoining counties when the public interest should demand it. And that *this has been the contemporaneous, practical and uniform construction of this article by the legislature and courts of law, from the adoption of the constitution down to the present period, may be safely inferred from many statutes which have passed, and judicial decisions which have taken place, in relation to this subject.*

The court, after referring to various statutes enacted between 1782 and 1795, providing for the trial of criminal

cases outside of the county in which the crime had been committed, further said, at page 555:—

These frequent acts of the legislature abundantly show the public sense of the intention of the people in the declaration referred to; and the judicial trials which have taken place out of the county in which the offences were committed have been numerous. Until the recent act, giving the Court of Common Pleas, when sitting in the county of Nantucket jurisdiction of all crimes committed there, excepting such as are capital, all crimes committed there not cognizable by the Court of General Sessions or the Court of Common Pleas, according to the former jurisdiction of these courts, have been tried before the Supreme Judicial Court in Suffolk.

St. 1795, c. 81, provided that the Supreme Judicial Court holden at Boston, within and for the County of Suffolk, should have original jurisdiction and cognizance of all crimes committed in the County of Nantucket which were not cognizable by the Court of General Sessions there, and provided, further, that in capital cases only, if the defendant so requested, the court should issue a venire for at least six jurors from the County of Nantucket.

R. S. (1836), c. 133, § 7, now G. L., c. 277, § 57, provided that any offence committed within one hundred rods of the dividing line between two counties might be prosecuted and punished in either county. In *Crocker v. Justices of the Superior Court*, 208 Mass. 162, the petitioners had been indicted for a felony, and the question was whether the Superior Court had jurisdiction to order a change of the place of trial from one county to another, if and when satisfied that a fair and impartial trial could not be had within the county where the venue was laid in the indictment. The court held that that court had such jurisdiction, and said, at pages 174-175:—

In the light of the history of our common law and the jurisdiction of our courts, we are of opinion that these statutes, so far as they empower a transfer in order to secure an impartial trial, are but declaratory of the common law and confer no new power. . . . These statutes and this

principle for securing an impartial trial in exceptional cases are in no way at variance with the general proposition of art. 13 of the Declaration of Rights as to the importance of the verification of facts in the vicinity where they happen.

The weight of opinion in those of the older States, whose judicial history is most nearly like our own, supports the view that it is an inherent power of common law courts to order a change for the purpose of securing an impartial trial.

The court further said at page 179: —

A court of general jurisdiction ought not to be left powerless under the law to do within reason all that the conditions of society and human nature permit to provide an unprejudiced panel for a jury trial. Without such a power it might become impossible to do justice either to the *general public* or to the individual defendant.

The proposed bill provides, in substance, that when the Attorney-General or the district attorney petitions to the court *before* proceeding with the trial of a criminal case for leave to proceed, stating that he is in doubt from the state of the evidence then in his possession as to whether or not the crime was committed within the county or territorial jurisdiction of the court, and the court, after hearing the petition, orders the trial to proceed, the defendant shall not be discharged for want of jurisdiction if the evidence as developed at the trial discloses that the crime was committed without the county or territorial jurisdiction of the court. Such an act is one that public good and necessity require, and, without it, it might be difficult to do justice to the general public.

The proposed bill is not, in my opinion, inconsistent with either the spirit or the letter of article XIII of the Declaration of Rights. I am therefore of the opinion that the proposed bill, if enacted, would be constitutional.

CONSTITUTIONAL LAW — INTOXICATING LIQUORS — FEDERAL PERMIT.

An act providing that no person shall manufacture, transport, import or export intoxicating liquors or certain non-intoxicating beverages unless he shall have obtained the Federal permit required therefor by the laws of the United States, is constitutional.

You request me to consider House Bill No. 1433, entitled "An Act relative to intoxicating liquors and certain non-intoxicating beverages," which reads as follows: —

To the
Governor.
1923
May 8.

No person shall manufacture, transport by air craft, water craft or vehicle, import or export spirituous or intoxicating liquor as defined by section three, or certain non-intoxicating beverages as defined by section one, unless in each instance he shall have obtained the permit or other authority required therefor by the laws of the United States and the regulations made thereunder.

Certain portions of the proposed bill were recommended by the Attorney General in his last annual report, on the unanimous request of the district attorneys and the district attorneys-elect of the various districts of the Commonwealth.

By Mass. Const., c. I, § 1, art. IV, the Legislature is given full power and authority to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, not repugnant or contrary to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and for the government and ordering thereof. Legislative power is thereby vested exclusively in the General Court, except so far as modified by the initiative and referendum amendment. It is a power which cannot be surrendered or delegated, or performed by any other agency. *Graham v. Roberts*, 200 Mass. 152; *Boston v. Chelsea*, 212 Mass. 127; *Dinan v. Swig*, 223 Mass. 516; *Opinion of the Justices*, 239 Mass. 606.

The question of the constitutionality of various provisions of law relative to intoxicating liquors (House Bill No.

1612 of 1921) was fully considered by the justices of the Supreme Judicial Court. *Opinion of the Justices*, 239 Mass. 606. At page 610, the justices said:—

It is attempted by these sections and possibly by other sections to make the substantive law of the Commonwealth in these particulars change automatically so as to conform to new enactments from time to time made by Congress and new regulations issued pursuant to their authority by subsidiary executive or administrative officers of the United States. It purports to create offences and impose punishments therefor, not by definition and declaration, but by reference to what may hereafter be done in these particulars by the Congress of the United States and those by it authorized to establish regulations.

We are of opinion that legislation of that nature would be contrary to the Constitution of this Commonwealth.

At pages 611–612, the justices said:—

By several sections of the proposed statute compliance with certain provisions of an act of Congress or valid regulations made pursuant to its authority is made a condition to the performance of conduct permitted by the proposed bill. Such conditions, even though the act of Congress may be changed, involve no modification of the law of Massachusetts. That stands as enacted. In this class fall §§ 11, 17, 19 and 23 of the proposed bill, which do not contravene any constitutional guaranty.

Section 11 of the bill of 1921 provided, in part, that no license issued by the Board of Registration in Pharmacy should be valid unless the licensee was lawfully authorized by the laws of the United States, and the regulations made thereunder, to sell intoxicating liquors for medicinal purposes. Section 17 of that bill provided, in part, that no manufacturer or wholesale druggist should sell or otherwise dispose of any liquor except to persons having permits required by the laws of the United States, and the regulations made thereunder, to purchase in such quantities. Section 19 of that bill provided, in part, that a carrier should deliver liquor only to persons who present a verified copy of a permit to purchase, in the form required by the laws of the United States, and the regulations made thereunder. Sec-

tion 23 of that bill provided, in part, that it was unlawful for any person to advertise liquor or the price at which it might be obtained, but that manufacturers and wholesale druggists holding permits to sell liquor, required by the laws of the United States, and the regulations made thereunder, were not prohibited from furnishing price lists, with a description of the liquor for sale, to persons permitted to purchase liquor.

The four foregoing sections, in the opinion of the justices, did not contravene any constitutional guaranty. VI Op. Atty. Gen. 179.

The proposed bill provides that no person shall manufacture, transport, import or export intoxicating liquors or certain non-intoxicating beverages unless in each instance he had obtained the permits or other authority required therefor by the laws of the United States, and the regulations made thereunder.

Applying the test of constitutionality, as defined in *Opinion of the Justices*, 239 Mass. 606, I am unable to differentiate the provisions of the proposed bill from the provisions of the four sections of the bill of 1921, which were held to be constitutional.

There is no substantive difference between the bill now before me and the provisions of St. 1922, c. 427, § 1, subsection 3 (an act to carry into effect, so far as the Commonwealth of Massachusetts is concerned, the Eighteenth Amendment to the Constitution of the United States). That there were no constitutional objections to those provisions was twice held by my predecessor.

In view of the foregoing, I am of the opinion that the proposed bill, if enacted, would be constitutional.

JUSTICE OF THE PEACE — NOTARY PUBLIC — TENURE OF
OFFICE — REMOVAL FROM THE COMMONWEALTH.

During the period for which a person is commissioned a justice of the peace or a notary public he is authorized, while in this Commonwealth, to act as such unless and until he has been removed by action of the Governor and Council, as provided by the Constitution, although he cannot act as such when outside the jurisdiction of the Commonwealth.

A removal from the jurisdiction does not *ipso facto* terminate the tenure of office of a public official.

To the
Secretary.
1923
May 10.

You request my opinion on the following facts: —

Under date of July 3, 1918, a man residing in Somerville, Mass., was commissioned as a justice of the peace and a notary public by the Governor and Council. The commissions, under the Constitution, were to expire July 3, 1925. About September, 1920, he left Massachusetts and became a resident of Maine, where he continued to live for a year and a half, during which period of time he exercised the voting privilege in that state. About one year ago he returned to Massachusetts and resumed residence in the city of Somerville.

Under the conditions referred to, can he now act as a justice of the peace and a notary public under the commissions of July 3, 1918, or is it your opinion that he must again be appointed by the Governor and Council so to act?

Mass. Const., pt. 2d, c. III, art. I, as amended by Mass. Const. Amend. LVIII, provides as follows: —

The tenure, that all commissioned officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned, and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution: provided nevertheless, the governor, with consent of the council, may remove them upon the address of both houses of the legislature: and provided also that the governor, with the consent of the council, may after due notice and hearing retire them because of advanced age or mental or physical disability. Such retirement shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement.

Mass. Const., pt. 2d, c. III, art. III, provides for the tenure of commissions of justices of the peace as follows: —

In order that the people may not suffer from the long continuance in place of any justice of the peace who shall fail of discharging the important duties of his office with ability or fidelity, all commissions of justices of the peace shall expire and become void, in the term of seven years from their respective dates; and, upon the expiration of any commission, the same may, if necessary, be renewed, or another person appointed, as shall most conduce to the well-being of the commonwealth.

In an opinion from a former Attorney-General to His Excellency the Governor (VI Op. Atty. Gen. 371), it was stated:—

Although the Constitution expressly provides that residence for a certain fixed period of time within the Commonwealth is a prerequisite to the election or appointment of many officers (for example, governor, Mass. Const., pt. 2d, c. II, § I, art. II; lieutenant-governor, Mass. Const., pt. 2d, c. II, § II, art. I; councillors, Mass. Const. Amend. XVI; senators, Mass. Const. Amend. XXII; representatives, Mass. Const. Amend. XXI; secretary, treasurer and receiver-general, auditor and attorney-general, Mass. Const. Amend. XVII), nevertheless, nowhere in the Constitution or in the General Laws is there to be found any requirement as to time of residence in Massachusetts before a person may become a justice of the peace or a notary public.

There is likewise no provision in the Constitution or statutes that removal from this Commonwealth shall *ipso facto* terminate the commission of a justice of the peace or a notary public. That a removal from the jurisdiction does not *ipso facto* terminate the tenure of office of a public official is evidenced by the fact that it has been deemed necessary or advisable by the Legislature to enact a statute declaring in certain cases that such removal shall terminate the office specified. For example, G. L., c. 41, § 109, provides, in part, that “if a person removes from a town he shall thereby vacate any town office held by him.” I am aware of no similar provision of law respecting justices of the peace or notaries public.

By the Constitution of the Commonwealth the office of justice of the peace is a judicial office. *Opinion of the Justices*, 107 Mass. 604. While the office of notary public is

not a judicial office, nevertheless, the Constitution provides (Mass. Const. Amend. IV) that "notaries public shall be appointed by the governor in the same manner as judicial officers are appointed and shall hold their offices during seven years."

The Constitution, however, provides for the removal of justices of the peace and notaries public. Mass. Const. Amend. XXXVII, provides: —

The governor, with the consent of the council, may remove justices of the peace and notaries public.

It accordingly follows that during the period for which a person is commissioned a justice of the peace or a notary public he is authorized, while in this Commonwealth, to act as such unless and until he has been removed by action of the Governor and Council, as provided by the Constitution, *supra*, although he cannot act as such when outside the jurisdiction of the Commonwealth. See V Op. Atty. Gen. 166.

CONSTITUTIONAL LAW — DISPOSITION OF LAND NO LONGER
ADAPTED TO PUBLIC USES — PUBLIC CHARITY — IM-
PAIRMENT OF OBLIGATION OF CONTRACT — *CY PRES*
— SALE OF OBSOLETE PROPERTY — PAYMENT OF MON-
EYS RECEIVED INTO STATE TREASURY.

Land acquired by the Commonwealth by eminent domain or through expenditure of public funds, held strictly for public purposes and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court, and may be transferred to an agency of the State government or devoted to some other public use by legislative mandate.

However, if land is subject to the terms of any gift, devise, grant, bequest or other trust or condition, the Legislature is not at liberty to dispose of the land or devote it to other purposes.

If it has become impracticable to administer a charitable trust according to its terms, a court of equity will exercise its power to devise some method of administering the charity *cy pres* to accomplish substantially the same result.

As an essential part of the duties of the Department of Public Welfare, it has the right to dispose, by sale, of dead and dying timber on land under its control.

The moneys received from the sale of such timber must be paid into the State treasury, in compliance with Mass. Const. Amend. LXIII, § 1.

You request my opinion upon certain questions of law having to do with a tract of land in the town of Walpole, known as Robbins Farm, and under the control of your department.

To the Com-
missioner of
Public Welfare.
1923
May 14.

Your first question is based on the following set of facts. Chapter 101 of the Resolves of 1911 authorized the State Board of Charity, whose powers and duties your department has since taken over, to receive and hold on behalf of the Commonwealth the right, title and interest in the said Robbins Farm, and to maintain the same, and to use it exclusively for and in connection with the care of minors. You state that your department is unable now to make any satisfactory use of this property for the purpose for which it was given to the Commonwealth, and the cost of the caretaker is, in your opinion, an unwarranted expense. You state that the heirs are willing to take the property back or to have it sold and the proceeds applied, in pursuance of the trust, to any other charity. You inquire whether or not your department has the power to dispose of the property.

Land acquired by the Commonwealth, a city or a town by eminent domain or through expenditure of public funds, held strictly for public purposes and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court. It may be transferred to some other agency of government or devoted to some other public use by legislative mandate. Up to 1921 the question never had arisen, for express judicial determination in this Commonwealth, as to whether land once taken in fee for a public use could be sold and devoted to private uses when, through lapse of time or by reason of changed conditions, and under legislative authority, it had been decided that such land was no longer needed for public uses. By the case of *Wright v. Walcott*, 238 Mass. 432, it was decided that such a sale would be valid when authorized by the Legislature. As shown above, this does not hold where the land is subject to the terms of any gift, devise, grant, bequest or other trust or condition. The Robbins Farm, held by your department, is apparently subject to the terms of a trust, and if the charitable gift can be administered according to the directions of the donor, in my judgment, the Legislature is not at liberty to dispose of the land upon considerations of policy or convenience. If it has become impracticable to administer this charitable trust according to its terms, it may well be that a court of equity will exercise its power to apply the doctrine of *cy pres*; that is, to execute the charitable trust as nearly according to the intent of the donor as circumstances will permit.

Your second question arises out of the following set of facts. On this Robbins Farm there is standing timber which Chief Forester Cook, of the Department of Conservation, has reported to you is infested with gypsy moths, so that most of it is dead. You ask whether or not you have the power to cut this dead and dying timber and sell the same.

I find no special provision authorizing the sale of property by your department, but there can be no question that,

under your general powers, you have the right to dispose of such property as you can no longer utilize. Such a right is incidental to and is an essential part of the duties given to you for the proper management and conduct of the properties under your control. These rights do not, however, confer upon you the right to expend the moneys received by you from the sale of such timber. Such moneys once received must be turned over to the Treasurer and Receiver General, in compliance with Mass. Const. Amend. LXIII, § 1, which provides that "all money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof." In addition, if you dispose of the aforesaid timber by sale, you should conform to such rules as the Commission on Administration and Finance has made affecting the "disposal of obsolete, excess and unsuitable supplies, salvage and waste material and other property," as provided by St. 1922, c. 545, § 12.

CONSTITUTIONAL LAW — TAXATION — EXCISE TAX — TAX
UPON THE SALE OF GASOLINE FOR CONSUMPTION IN
THE OPERATION OF MOTOR VEHICLES UPON THE HIGH-
WAYS OF THE COMMONWEALTH.

House Bill No. 1520 imposes an excise tax upon the privilege of driving motor vehicles upon the public highways of the Commonwealth, and not upon the privilege of selling gasoline.

An excise tax upon the privilege of driving motor vehicles upon the highways of the Commonwealth, which contains a provision that "no provisions of this chapter shall apply . . . to interstate commerce, except in so far as the same may be permitted under the . . . constitution of the United States and the acts of congress," is not in contravention of either the Federal or the State Constitution.

In an excise tax upon the privilege of driving motor vehicles upon the highways of the Commonwealth the amount of gasoline purchased for consumption in the operation of motor vehicles affords a fair criterion of the extent to which the highways are used, and the imposition of the tax upon the sale of gasoline for that purpose is a proper and convenient method of administration.

Quære, Whether an excise tax upon the privilege of selling gasoline generally would not be unconstitutional.

A tax imposed upon the sale of gasoline for consumption in the operation of motor vehicles is not an import duty, within the prohibition of U. S. Const., art. I, § 10.

To the
House of Rep-
resentatives.
1923
May 14.

I have the honor to acknowledge the receipt of an order of the House of Representatives in the following form: —

Ordered, That the Attorney General be requested to furnish to the House of Representatives an opinion on the constitutionality of the bill to provide funds toward the cost of construction and maintenance of highways and bridges by means of an excise tax on gasoline and other fuel used for propelling motor vehicles over the highways of the Commonwealth (House Bill No. 1520).

Your inquiry requires consideration of pertinent provisions of both the Constitution of Massachusetts and of the United States.

I. Has the Legislature the power, under the Constitution of Massachusetts, to pass an excise tax of the nature of the one under consideration?

If the tax be viewed as one imposed upon the privilege of selling gasoline, the question is not free from doubt.

Mass. Const., pt. 2d, c. I, § I, art. IV, provides: —

And further, full power and authority are hereby given and granted to the said general court, . . . to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; . . .

Prior to 1883 the court seemed inclined to construe very broadly the grant of power to levy excise taxes. In *Portland Bank v. Apthorp*, 12 Mass. 252, 256, Chief Justice Parker expounded the significance of this clause of the Constitution in a paragraph which has since become classic. He said:—

The term *excise* is of very general signification, meaning tribute, custom, tax, tollage, or assessment. It is limited, in our constitution, as to its operation, to produce, goods, wares, merchandise and commodities. This last word will perhaps embrace everything, which may be a subject of taxation, and has been applied by our legislature, from the earliest practice under the constitution, to the privilege of using particular branches of business or employment, as the business of an auctioneer, of an attorney, of a tavern keeper, of a retailer of spirituous liquors, &c.

It must have been under this general term commodity, which signifies convenience, privilege, profit and gains, as well as goods and wares, which are only its vulgar signification, that the legislature assumed the right which has been uniformly and without complaint exercised for thirty years, of exacting a sum of money from attorneys, and barristers at law, vendue masters, tavern keepers and retailers. For every man has a natural right to exercise either of these employments free of tribute, as much as a husbandman or mechanic has to use his particular calling. The money required of them is not a proportional tax; nor is it an excise or duty upon produce, goods, wares or merchandise. It is a commodity, convenience or privilege, which the legislature has, by contemporaneous construction of the constitution, assumed a right to sell at a reasonable price: and by parity of reason it may impose the same conditions upon every other employment or handicraft.

This statement appears to have been accepted as the true exposition of the meaning of the clause for many years. *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen, 428, 431.

Under these decisions an excise tax could be imposed upon the exercise of a so-called "natural right" as readily as upon one created or subject to regulation by law.

In 1883, however, the Supreme Judicial Court adopted a narrower view of the powers of the Legislature, and held that an act extending the excise tax previously laid on corporations so as to include unincorporated companies with a capital stock divided into transferable shares was unconstitutional. *Gleason v. McKay*, 134 Mass. 419.

The view put forward in *Gleason v. McKay*, *supra*, was severely criticized in the case of *Minot v. Winthrop*, 162 Mass. 113, but appears to have been at least partially re-adopted in *O'Keefe v. Somerville*, 190 Mass. 110.

In *Opinion of the Justices*, 196 Mass. 603, rendered in 1908, the question of the constitutionality of an act imposing a tax on sales of shares or certificates of stock in any domestic or foreign corporation or association was under consideration. A majority of the court held that such an act would be constitutional. The justices were divided in their opinion as to the true significance and effect of the earlier cases. Three of the justices were of the opinion that "the power of the General Court in imposing and levying an excise duty is not less extensive than that of Congress." Three dissented from this opinion, and held that the powers of the Massachusetts Legislature in this respect were narrower than those of Congress, and that an excise tax on the exercise of a purely natural right was unconstitutional. The present chief justice expressed the opinion that "although, speaking generally, the right to own property is absolute, the right to contract with reference to all sales of property is not equally absolute," and that a sale of an interest in an unincorporated association, when included in a legal, general classification, might be the subject of an excise tax.

That Congress has the power to impose an excise tax upon the sale of a commodity seems clear. *McCray v. United States*, 195 U. S. 27.

It is unnecessary, however, to hazard an opinion upon the point on which the court divided in *Opinion of the Justices*, 196 Mass. 603, in order to answer the inquiry propounded to me. Another line of reasoning suggests itself upon which, in my opinion, the validity of the proposed tax may be rested.

Many features of the act suggest that the privilege upon which the excise is imposed is in reality the privilege of driving motor vehicles upon the public highways of the Commonwealth, rather than that of selling gasoline; and that a tax is imposed upon the sale of gasoline merely as a convenient method of administration, and because the amount of gasoline purchased affords a fair and workable, if rough, criterion of the extent to which the highways are used.

The title of the act is significant, — “An Act to provide funds toward the cost of construction and maintenance of highways and bridges by means of an excise tax on gasoline and other fuel used for propelling motor vehicles over the highways of the Commonwealth.” The “fuel” upon the sale of which the tax is nominally imposed is defined in section 1 by reference to its suitability for use in propelling motor vehicles. In the same section “purchaser” and “sale” are so defined as to include within the act the transfer of fuel by a distributor into his own motor vehicle. Section 7 exempts from taxation sales of fuel subsequently consumed in any manner other than “in the operation of motor vehicles operated or intended to be operated over the highways of the commonwealth.” Section 9 provides that the tax in every instance shall be borne by the purchaser; and that the exemption established by section 7 shall be effected by a rebate to the ultimate consumer, that is, the motorist, himself, not to the original distributor or to any middleman. Finally, by section 13 the entire net yield of the tax is to be credited to a “gasoline-highway fund,” and expended for the construction, improvement and maintenance of public ways and highways.

The power of the Commonwealth in the regulation of its own public ways is beyond question. *Commonwealth v. Slocum*, 230 Mass. 180; *Burgess v. Mayor and Aldermen of Brockton*, 235 Mass. 95. Viewed, therefore, as an excise tax, or toll, for the use of the public ways of the Commonwealth, the proposed act is, in my opinion, within the power conferred upon the Legislature by the Constitution of Massachusetts.

The constitutionality of the State registration law, under which the tax is graded by reference to horse power, rests upon a similar principle. *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. Titus*, 81 N. J. L. 594, 598; *Kane v. New Jersey*, 242 U. S. 160, 168.

The Constitution of the State of New Hampshire has no provision permitting the imposition of an excise tax; and it is beyond the constitutional power of the Legislature to impose any taxes other than "proportional and reasonable assessments, rates and taxes." *State v. Express Co.*, 60 N. H. 219; *Curry v. Spencer*, 61 N. H. 624. Yet the justices of the Supreme Court of New Hampshire have recently rendered an opinion based upon reasoning similar to that relied upon above, to the effect that "a gasoline tax collected from wholesalers on all sales of gasoline, with a provision for a rebate to consumers who use the gasoline for purposes other than the operation of automobiles," "amounts to the same thing, in substance, as a toll for the use of the highways, and may lawfully be imposed by the Legislature." *Opinion of the Justices*, 81 N. H. 552.

The license required by section 2 appears to me an appropriate method of enforcing the proposed tax; one well adapted, at least, if not essential, to its efficient administration, and unobjectionable, provided the tax itself, to which it is merely incidental, is one which the Legislature is competent to impose. Cf. *Boston v. Schaffer*, 9 Pick. 415; *Dewey v. Richardson*, 206 Mass. 430.

II. The proposed act gives to persons who buy fuel, as defined therein, on which an excise has been paid, and who

consume the same "in any manner except in the operation of motor vehicles operated or intended to be operated over the highways of the commonwealth," a right to be reimbursed the amount of the excise, and "motor vehicle" is so defined as to except "boats, tractors used exclusively for agricultural purposes, and such vehicles as run only on rails or tracks."

The question is presented whether these exemptions constitute an arbitrary discrimination and class legislation, in contravention of either the Federal or the State Constitution.

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, a State anti-trust act excepting from its operation "agricultural products or live stock while in the hands of the producer or raiser," was held unconstitutional because it created an arbitrary discrimination and denied to others the equal protection of the laws. See V Op. Atty. Gen. 80. But this case has frequently been distinguished in more recent decisions of the Supreme Court of the United States, and the court has gone far in upholding classifications as reasonable, against attack on the ground of inequality or discrimination. *International Harvester Co. v. Missouri*, 234 U. S. 199; *Commonwealth v. Titcomb*, 229 Mass. 14. If, as I have indicated, the proposed tax is to be regarded as a toll for the use of the highways of the Commonwealth, then, clearly, the exemption from tax of sales of fuel for other purposes is fully justified.

III. The remaining question is whether in any other respect the proposed act conflicts with any provision of the Federal Constitution.

U. S. Const., art. I, § 10, provides: —

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

U. S. Const., art. I, § 8, provides: —

The congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
...

In my opinion, the first of these provisions, that forbidding any State to impose an import tax, is not violated by the proposed act. No tax is imposed upon the importation of gasoline into the State. It may be imported freely, kept for any length of time, and used by the importer for any purpose other than the propulsion of a motor vehicle, without subjecting the importer to any tax liability. In short, the tax, in my opinion, is not in any true sense an import duty.

So far as the question of possible encroachments upon Congress' power over interstate commerce, under section 8 of article I, quoted above, is concerned, the act is carefully drawn to avoid any such difficulty.

The sales forbidden by section 2 unless a license has first been procured by the distributor, are specifically restricted to exclude sales, the imposition of a tax upon which would be unconstitutional because a burden upon interstate commerce.

As previously stated, any person who consumes fuel on which an excise has been paid, "in any manner except in the operation of motor vehicles operated or intended to be operated *over the highways of the commonwealth*," by section 7 is entitled to be reimbursed the amount of the excise.

Section 8 provides:—

No provisions of this chapter shall apply or be construed to apply to international or interstate commerce, except in so far as the same may be permitted under the provisions of the constitution of the United States and the acts of congress.

And section 12 establishes appropriate machinery for the enforcement of this immunity. That section provides:—

The supreme judicial court shall have jurisdiction in equity to restrain the collection, upon any sale exempted by the constitution and laws of the

United States, of the excise imposed by this chapter. Said bill shall be brought against the commissioner, whether the question of the collection of the excise is in the hands of the attorney general or pending before the board of appeal or is still in the hands of the commissioner.

In view of these safeguards against encroachment upon the exclusive power which Congress possesses over interstate commerce, I am of the opinion that the proposed tax contravenes no provision of the Federal Constitution.

It follows that, in my opinion, House Bill No. 1520 is within the power of the Legislature to enact and, if so enacted into law, would be constitutional.

CONSTITUTIONAL LAW — ARBITRARY DISCRIMINATION —
CLASS LEGISLATION — MARKETING CONTRACTS BE-
TWEEN CO-OPERATIVE AGRICULTURAL ASSOCIATIONS
AND THEIR MEMBERS.

A statute providing for the incorporation of co-operative agricultural associations without capital stock, authorizing the making of marketing contracts between such corporations and their members for the sale of their products for a certain period of time exclusively to or through the corporation, and providing that such contracts should not be construed as in violation of the anti-trust laws contained in G. L., c. 93, §§ 1-7, unless they resulted in undue enhancement of prices, would not be unconstitutional as making an arbitrary discrimination in favor of a particular class.

You have transmitted to me for examination and report House Bill No. 1398, entitled "An Act to provide for the incorporation of co-operative agricultural associations without capital stock."

To the
Governor.
1923
May 15.

The purpose of the bill, as its title and its provisions indicate, is to authorize the incorporation without capital stock of associations engaged in any kind of farming business, to provide for the management of such corporations by the members thereof and to limit the membership to persons engaged in the production of products handled by the corporation, to permit the making of marketing contracts between such corporations and their respective members "by which the members shall agree to sell, for any period

of time not exceeding ten years, all or any specified part of their products or of certain specified products exclusively to or through the corporation or any agency designated by it," and to make such marketing contracts effective by authorizing the fixing of liquidated damages for breach thereof and by providing that the corporation may be entitled to an injunction against a member for breach or threatened breach of the contract with reference to its provisions for sale or delivery of products. There is a provision that "such contract shall not be construed as a violation of any provision of sections one to seven, inclusive, of chapter ninety-three, unless it results in an undue enhancement of the price of the product to which the contract applies," and that such corporation shall not be liable to prosecution for any action, reasonable and proper, in the exercise of the rights conferred upon it by the act. There are further provisions imposing taxes on such corporations; and other provisions the object of which is to remove inconsistencies in other parts of the General Laws.

Some of the provisions of the proposed act in the form submitted by Your Excellency seem to me to be, if not actually unconstitutional, at least objectionable because in several respects they appear to run counter to the policy of our laws. Proposed amendments to the bill have been drafted which, in my opinion, if adopted, would cure the defects in the present bill which I have referred to.

The proposed amendments do not, however, attempt to deal with the possible objection to the bill because of the provisions authorizing the making of marketing contracts between the corporations and their members and excepting such contracts from the operation of the anti-trust laws contained in G. L., c. 93, §§ 1-7. The question, therefore, must be considered whether this authorization and exception constitute an arbitrary discrimination and class legislation, making the provisions unconstitutional.

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, a State anti-trust act excepting from its operation "agricultural

products or live stock while in the hands of the producer or raiser" was held unconstitutional because it created an arbitrary discrimination and denied to others the equal protection of the laws. On the authority of this case, one of my predecessors held, in an opinion to the Governor under date of May 24, 1917 (V Op. Atty. Gen. 80), that an act was unconstitutional, the object of which was "to prohibit combinations and monopolies to control prices of commodities in common use," which contained a provision excepting from its operation "agreements between farmers, or other persons engaged in agricultural or horticultural pursuits, relative to the sale of the products of their own farms." But the Connolly case has frequently been distinguished in more recent decisions of the Supreme Court of the United States, and the court has gone far in upholding classifications as reasonable, against attack on the ground of inequality or discrimination. *International Harvester Co. v. Missouri*, 234 U. S. 199; *C. A. Weed & Co. v. Lockwood*, 266 Fed. 785, 791, 792; *Commonwealth v. Titcomb*, 229 Mass. 14, and cases cited.

Indeed, Congress itself has excepted agricultural and other associations from the operation of anti-trust laws. Section 6 of the Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 731) provides that "nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws"; and by Act of February 18, 1922, c. 57, 42 Stat. 388, entitled "An Act to authorize association of producers of agricultural products," Congress enacted that persons engaged in the production of agricultural products, including dairymen,

may act together in associations, corporate or otherwise, in collectively marketing their products in interstate and foreign commerce and may make the necessary contracts to effect such purposes, with certain provisos, and subject to restraint by the Secretary of Agriculture and the courts, in case it appears that there is a monopoly or restraint of interstate commerce to such an extent that the price of an agricultural product is unduly enhanced by reason thereof. The constitutionality of those provisions, as far as I am aware, has not been questioned.

In the proposed act the thing which is the subject of the excepting provisions is the marketing contract. This contract is merely an agreement between the corporation and a member by which the member agrees to sell for a certain period of time all of a specified part of his products exclusively to or through the corporation. At common law the legality of an agreement by which one person agrees to sell a product to another person exclusively seems to depend upon the reasonableness of the agreement in the light of the circumstances under which it is made and its purpose and effect. Unless it creates or tends to create a monopoly or results in an undue restraint of trade, such an agreement is valid. *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 363; *Meyer v. Estes*, 164 Mass. 457, 464, 465; *N. Y. Bank Note Co. v. Kidder Press Mfg. Co.*, 192 Mass. 391, 403.

In the absence of statute authorizing the making of such a contract its legality may also be affected by G. L., c. 93, §§ 1 and 2. These sections are as follows: —

SECTION 1. No person, firm, association or corporation doing business in the commonwealth, shall make it a condition of the sale of goods, wares or merchandise that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person, firm, association or corporation; but this section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of, goods, wares or merchandise. . . .

SECTION 2. Every contract, agreement, arrangement, combination or

practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained or prevented; or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void.

Section 1, however, would not be applicable because of the proviso that the making of contracts for the exclusive sale of goods, wares or merchandise is not prohibited. *Commonwealth v. Strauss*, 191 Mass. 545. Section 2 would be applicable only in so far as the contract might create or maintain a monopoly in dealings in the Commonwealth in the product, or might restrain competition in the Commonwealth in the supply or price of the product, or might restrain trade in the Commonwealth for the purpose of creating or maintaining such monopoly, or might unduly enhance within the Commonwealth the price of the product. Cf. *Commonwealth v. North Shore Ice Delivery Co.*, 220 Mass. 55.

The proposed act limits the exception from the operation of section 2 to cases where the marketing contract does not result in an undue enhancement of the price of the product to which the contract applies, and limits the corporation to exemption from prosecution only in so far as its action in the exercise of rights conferred by the act is reasonable and proper. Whether it is intended by the bill to permit the corporations which it authorizes to create and maintain monopolies in farming products, and incidentally to restrain competition in the supply and price of such products in the Commonwealth, does not clearly appear; but such monopolies or restraints of competition, so long as they do not

result in undue enhancement of prices, cannot seriously harm the public.

The question is not whether the marketing contracts authorized may not conceivably be such as to come under the ban of the common law or the anti-trust statute, but whether the provisions authorizing them are so arbitrary in their discrimination as to be constitutionally invalid. One may readily infer that the object of the bill in permitting organizations of farmers through which their products may be exclusively marketed is to enable the farmer to dispose of his products in a way which will be beneficial not only to the farmer, but, by encouraging him to greater production, to the community at large. Similar enactments, which apparently have not been challenged, have been passed by Congress, and I am informed in other States. I therefore advise you that the provision in question would not be unconstitutional as making an arbitrary discrimination in favor of a particular class.

The provisions authorizing the making of marketing contracts do not expressly limit them to transactions merely in intrastate commerce. So far as appears, members of the corporations authorized to be formed may reside and do business in other States, and the marketing contracts for which the bill provides may affect interstate trade. Of course, the proposed act cannot make valid contracts in restraint of interstate trade and monopolies of such trade which are illegal by Federal law; nor would the act be construed as attempting so to do. But, while I am not called upon to decide that question, it seems that the Federal statutes to which I have referred expressly permit the organization of corporations and the making of marketing contracts such as are authorized by the bill.

LABOR — HOURS OF EMPLOYMENT — WOMEN AND CHILDREN
— APPLICABILITY OF G. L., c. 149, § 56, TO LAUNDRIES
OF PRIVATE BOARDING HOUSES AND HOSPITALS —
EIGHT-HOUR DAY — ENGINEERS — LAUNDRIES AT
STATE HOSPITALS.

G. L., c. 149, § 56, limiting the hours of labor of women and children applies to laundries of private boarding houses and hospitals, and the hours of employment of women and children, regularly and exclusively employed therein, are limited as provided for in said § 56.

The service of engineers employed in State hospitals, whose duties deal with furnishing power to laundries, is restricted to eight hours in any one day, and to forty-eight hours in any one week, except in cases of extraordinary emergency.

You request my opinion on the following questions: —

To the Com-
missioner of
Labor and
Industries.
1923
May 15.
—

1. Are laundries maintained in private boarding houses and in hospitals included within the requirements authorized by G. L., c. 149, § 56, or do such requirements apply only to laundries engaged in doing work for the general public?

2. Are engineers employed in State hospitals, whose duties deal with furnishing power to laundries, restricted to eight hours in one day or forty-eight hours in a week, except in cases of extraordinary emergency?

G. L., c. 149, § 56, as amended by St. 1921, c. 280, so far as it pertains to your first inquiry, provides as follows: —

No child and no woman shall be employed in laboring in any factory or workshop, or in any manufacturing, mercantile, mechanical establishment, telegraph office or telephone exchange, or by any express or transportation company, or in any laundry, hotel, manicuring, or hair dressing establishment, motion picture theatre, or as an elevator operator, or as a switchboard operator in a private exchange, more than nine hours in any one day, . . .

Statutes limiting the hours of employment of children were first enacted in 1842. This statute (St. 1842, c. 60) was limited to children under the age of twelve employed in laboring in any manufacturing establishment. In 1867, by St. 1867, c. 285, mechanical establishments were added, and in 1874 (St. 1874, c. 221) women were first included.

As the avenues of employment for women and children

expanded, the Legislature extended the scope of inhibitions, in 1913, so as to include any factory or workshop, any mercantile establishment, telegraph office or telephone exchange, and any express or transportation company. St. 1913, c. 758. Finally, in 1921, the statute was amended by adding the words: "any laundry, hotel, manicuring or hair dressing establishment, motion picture theatre, or . . . elevator operator, or . . . switchboard operator in a private exchange." St. 1921, c. 280.

Prior to the passage of the 1921 amendment to G. L., c. 149, § 56, the Legislature recognized the need for regulation and inspection of conditions of employment in laundries by including them within its definition of the phrase "buildings used for industrial purposes." St. 1912, c. 726, § 5.

G. L., c. 149, § 17, provides as follows: —

For the enforcement of the provisions of this chapter, the commissioner, the director of the division of industrial safety and inspectors may enter all buildings and parts thereof used for industrial purposes and examine the methods of protection from accident, the means of escape from fire, the sanitary provisions, the lighting and means of ventilation, and make investigations as to the employment of women and minors and as to compliance with all provisions of this chapter.

G. L., c. 149, § 1, defines "buildings used for industrial purposes" as including "factories, workshops, bakeries, mechanical establishments, laundries, foundries, tenement house workrooms, all other buildings or parts thereof where manufacturing is carried on, and mercantile establishments as defined in this section."

Your first inquiry raises the question as to whether the words "in any laundry," as used in St. 1921, c. 180, and the word "laundries," as used in the definition of the phrase "buildings used for industrial purposes" (G. L., c. 149, § 1), are limited to establishments primarily and exclusively conducted as laundries by way of trade, that is, as an independent industry or business, or whether they can be said to include such establishments when maintained and

operated as subsidiary to and as an adjunct of some other business or commercial pursuit.

In *Duggan v. Bay State Street Ry. Co.*, 230 Mass. 370, 374, the court said: —

It is a principle of general scope that a statute must be interpreted according to the intent of the makers, to be ascertained from its several parts and all its words construed by the ordinary and approved usage of the language, unless they have acquired a peculiar meaning in the law, considered in connection with the cause of its enactment, the subject-matter to which it applies, the pre-existing state of the common and statutory law, the mischief or imperfection to be remedied, and the main object to be accomplished, to the end that it be given an effect in harmony with common sense and sound reason. . . .

The manifest purpose and intent of the Legislature in enacting these particular statutes were the limitation of the hours of employment of women and children, so as to protect them, because of their age and sex, from physical and moral dangers of certain occupations and certain places of employment, as enumerated therein; and to regulate and inspect certain places in which certain employment was carried on, because of the conditions under which the employment was performed, in order to protect the employees engaged therein from danger to health, life and limb. *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383; *Commonwealth v. Riley*, 210 Mass. 387.

A "laundry" is defined by the Standard Dictionary as — "An establishment or a room for washing and ironing clothes." Laundry work, i.e., washing and ironing, is the same whether performed for the general public or for a limited or particular group. The work may be just as arduous and confining, and the evils from long and continued hours of employment just as great, when performed in a laundry which is maintained and operated as subsidiary, or incidental, to some other principal commercial or industrial enterprise, as in one whose sole and principal business is that of laundering. The same kind of apparatus

and machinery may be, and generally is, in use in one as in the other. The same evil conditions may abound, and the same degree of effort must be employed.

As a matter of fact, there are any number of private boarding houses or hospitals where, because of the number of persons residing or confined therein, the daily or weekly wash is larger, and the number of persons specially employed in the laundry attached to the private boarding house or hospital is much greater, than in many so-called public laundries, i.e., laundries which do washing and ironing for the general public.

There can be no question but that the Legislature, in including laundries within the list of inhibitions, had in mind not the particular business carried on by them, but rather the nature and kind of employment performed therein and the conditions under which the employment was performed. As these are primarily the same in a laundry attached to a private boarding house or hospital, where the washing and ironing are done for the residents or inmates thereof, as in a laundry engaged in doing work for the general public, I am of the opinion that laundries attached to private boarding houses or hospitals, in which the employees are regularly and exclusively employed in the performance of work therein, are included within the requirements authorized by G. L., c. 149, § 56, as amended, and that the hours of employment of women and children, regularly and exclusively employed therein, would be limited as provided for in said section 56.

As to your second inquiry, G. L., c. 149, § 30, provides, in so far as it applies to your particular inquiry, as follows: —

The service of all laborers, workmen and mechanics now or hereafter employed by the commonwealth . . . is hereby restricted to eight hours in any one day and to forty-eight hours in any one week. No officer of the commonwealth . . . shall require or permit any such laborer, workman or mechanic to work more than eight hours in any one day, or more than forty-eight hours in any one week, except in cases of extraordinary emergency.

Section 36 of said chapter 149 provides: —

Sections thirty, thirty-one and thirty-four shall not apply to the preparation, printing, shipment and delivery of ballots to be used at a caucus, primary, state, city or town election, nor during the sessions of the general court to persons employed in legislative printing or binding; nor shall they apply to persons employed in any state, county or municipal institution, on a farm, or in the care of the grounds, in the stable, in the domestic or kitchen and dining room service or in store rooms or offices. . . .

The term “domestic” has a widely varying meaning. Its significance must be determined with reference to the subject-matter and the relation in which it appears. As used in said section 36, I am of the opinion that it was intended to apply only to that particular group or class of employees who perform such work or employment as is usually performed by domestics or house servants, men or women.

Even if it were to be said that persons employed in the laundry of a State institution could be considered domestics, and therefore within the meaning of the term “domestic service,” as used in said section 36, I am of the opinion that the term would still be limited to such employees as perform the principal and particular work carried on in a laundry, namely, washing and ironing, and that it would not include employees like engineers, whose duties deal merely with furnishing power to laundries, — work and employment which is clearly incidental to the operation of the laundry.

I am therefore of the opinion that engineers employed in State hospitals, whose duties deal with furnishing power to laundries, are restricted to eight hours in one day, or forty-eight hours in one week, except in cases of extraordinary emergency.

MARRIAGES — AUTHORITY TO SOLEMNIZE — OFFICERS OF
THE SALVATION ARMY — “MINISTERS OF THE GOSPEL”
— “DENOMINATION” — “ORDAINED.”

The phrase “minister of the gospel,” in G. L., c. 207, § 38, signifies one who expounds a system of belief based, at least primarily, upon the teachings of Christ.

The word “denomination,” in G. L., c. 207, § 38, may be defined as a religious sect united upon a common creed or system of faith, which, if it holds that creed in common with other sects, is further distinguished from these by its belief in matters of polity or discipline.

An ordained minister, in the sense in which the word “ordained” is employed in G. L., c. 207, § 38, is one who has been set apart as a public teacher of religion according to the forms of the particular sect to which he belongs.

An officer of The Salvation Army is not “a minister of the gospel, ordained according to the usage of his denomination,” within G. L., c. 207, § 38, and is not authorized to solemnize a marriage within the Commonwealth.

To the
Secretary.
1923
May 15.

You have asked my opinion on a number of questions involving the authority of certain persons to solemnize a marriage in this Commonwealth.

The resolution of questions of fact is, of course, no part of the duty of this department, and my answers to the inquiries propounded by you are therefore based exclusively, in so far as questions of fact are concerned, upon data supplied by you.

Authority to solemnize marriages within the Commonwealth is governed by G. L., c. 207, § 38, which provides as follows: —

A marriage may be solemnized in any place within the commonwealth by a minister of the gospel, ordained according to the usage of his denomination, who resides in the commonwealth and continues to perform the functions of his office; by a rabbi of the Israelitish faith, duly licensed by a congregation of said faith established in the commonwealth, who has filed with the clerk or registrar of the town where he resides a certificate of the establishment of the synagogue, the date of his appointment thereto and of the term of his engagement; by a justice of the peace if he is also clerk or assistant clerk of a town, or a registrar or assistant registrar, in the town where he holds such office, or if he is also clerk or assistant clerk of a court, in the city or town where the court is authorized to be held, or if he has been designated as provided in the following section and has received a certificate of designation and has qualified thereunder, in the

town where he resides; and it may be solemnized among Friends or Quakers according to the usage of their societies; but no person shall solemnize a marriage in the commonwealth unless he can read and write the English language.

The questions before me are exclusively questions of statutory interpretations. Whether authority to solemnize marriages should be given to others than those enumerated in the existing statute is, of course, for the Legislature alone to determine; and if at any time it deems it for the public good to do so, it can readily provide such authority by an amendment to the statute.

Under the act in its present form, however, no person, other than a rabbi of the Israelitish faith, a justice of the peace, a Quaker or a member of the Society of Friends, is authorized to solemnize a marriage within the Commonwealth unless he possesses the following qualifications:— (1) He must be “a minister of the gospel”; (2) he must be a member of some “denomination”; (3) he must have been “ordained” according to the usage of such denomination; (4) he must be a resident of Massachusetts; (5) he must be a minister of the gospel of whom it may fairly be said that he “continues to perform the functions of his office”; and (6) he must be able to read and write the English language.

In my opinion, the phrase “minister of the gospel” imports a requirement that the person be one who expounds a system of belief based, at least primarily, upon the teachings of Christ. *Attorney General v. Wallace*, 7 B. Mon. (Ky.) 611.

A “denomination” is technically a religious sect, and involves the idea of a common creed or system of faith. See *State v. Township 9*, 7 Ohio St. 64. It is thus defined in the New Standard Dictionary:—

A sect or school having a distinguishing name; especially a body of Christians united by a common faith and form of worship and discipline.

It may be that the distinguishing feature of a denomination is not its creed, which it may hold in common with other

denominations, but its belief in matters of polity and discipline. See *The Dublin Case*, 38 N. H. 459, 543; *Hale v. Everett*, 53 N. H. 9, 92. But in any event, a denomination is a religious sect distinct from other sects in belief or in methods of discipline. See *Lawrence v. Fletcher*, 8 Met. 153, 162. In my opinion, therefore, the word "denomination," as used in G. L., c. 207, § 38, may be defined as a religious sect united upon a common creed or system of faith which, if it holds that creed in common with other sects, is further distinguished from these by its belief in matters of polity or discipline.

The verb "to ordain" is defined as follows in the New Standard Dictionary:—

To appoint and consecrate or set apart for some special work; specifically, in church use, to invest with ministerial or priestly functions, with the laying on of hands or other ceremonies; as, *to ordain* a minister.

An ordained minister is one who has been set apart as a public teacher of religion according to the forms of the particular sect to which he belongs. *Londonderry v. Chester*, 2 N. H. 268. The ordination of a minister has always been a proceeding of great importance and solemnity, and marks the entrance of the person ordained upon the profession of religious teaching. *Kibbe v. Antram*, 4 Conn. 134, 139; *Charleston v. Allen*, 6 Vt. 633. It would seem that thereafter he can be removed from office only by due action of the constituted authorities of his denomination; and then, ordinarily, only upon the ground of an essential change of doctrine, or of a wilful neglect of duty, or of immoral or criminal conduct. *Burr v. The First Parish in Sandwich*, 9 Mass. 277; *Sheldon v. Congregational Parish in Easton*, 24 Pick. 281; *Reformed Dutch Church v. Bradford*, 8 Cowen, 457. In the course of the opinion in the first case cited above, on page 298, it was said:—

The consequence would be, either that the parish had no remedy . . . or that they might dissolve the ministerial contract by their own vote,

thus reducing the office of a minister to a mere tenure at will, which would be repugnant to the nature of the office.

Two, at least, of the essential features of ordination would therefore appear to be the solemn and ceremonial nature of the proceeding, and the fact that its consummation insures thereafter a certain degree of permanency in office. See Buck: *Mass. Ecclesiastical Law*, c. VII.

Turning now to the specific questions propounded by you.

1. Are the officers of The Salvation Army ordained ministers, and have they authority to solemnize a marriage in this Commonwealth?

The Salvation Army appears to be an organization formed upon a quasi-military pattern, for the revival of religion among the masses. It was founded in England by the Methodist evangelist, William Booth, about 1865, under the name of the Christian Mission; the present name and organization were adopted about 1878. . . . Its work is carried on by means of processions, street singing, preaching, and the like, under the direction of officers entitled generals, majors, captains, etc. Besides its religious work, it engages in various reformatory and philanthropic enterprises. Its doctrines appear to bear a general resemblance to those common to all Protestant evangelical churches, and especially to those of Methodism.

Upon joining the organization a "recruit" signs what are called the "Articles of War," some of which are as follows: —

1. Having received with all my heart the Salvation offered to me by the tender mercy of Jehovah, I do here and now publicly acknowledge God to be my Father and King, Jesus Christ to be my Saviour, and the Holy Spirit to be my Guide, Comforter and Strength; and that I will, by His help, love, serve, worship and obey this glorious God through all time and through all eternity.

2. Believing solemnly that The Salvation Army has been created by God and is sustained and directed by Him, I do here declare my full determination, by God's help, to be a true soldier till I die.

3. I do here and now, and forever, renounce the world with all its sinful pleasures, companionships, treasures and objects, and declare my

full determination boldly to show myself a soldier of Jesus Christ in all places and companies, no matter what I may have to suffer, do, or lose by so doing.

4. And I do here and now call upon all present to witness that I enter into this undertaking of my own free will, feeling that the love of Christ, who died to save me, requires from me this devotion of my life to His service for the salvation of the whole world.

The signing of these "Articles of War" is apparently accompanied by appropriate ceremonies, and there are prescribed by "The Orders and Regulations for Field Officers" ceremonies for funerals and marriages, and for making of covenants, as, for instance, the "General Holiness Covenant" and the "War Covenant." There are, in addition, orders and regulations in great detail for the instruction and drill of the "soldiers" and for the conduct and behavior of the "field officer" in various situations and under different circumstances.

It is unnecessary to decide whether The Salvation Army may properly be termed a "denomination," because I am of the opinion that an officer of that organization, authorized by it to solemnize marriages, is not "an ordained minister," within the meaning of the statute. Whatever title an officer of The Salvation Army may have to be considered an ordained minister would seem to be derived from his "commission." This is a document which sets forth that —

I,, as Representative of, and on behalf of, the said General William Booth, do hereby appoint and officially commission our faithful and trusted comrade with the title of, to act for me and on behalf of the American Headquarters in all matters that are involved in the faithful, honorable and efficient discharge of that office, ever bearing in mind the furtherance and prosperity of the said Salvation Army.

It further contains the following clause: —

And further, it is fully understood and agreed that this Commission shall only remain in force so long as the holder of it carries out its provisions, and during my will and pleasure, and that the holder of the same

faithfully promises to deliver it up whenever requested to do so by the said William Booth, General, his successor . . . or other commissioner duly appointed by him, — when it shall become void, and the same is revocable at the pleasure of the said . . . , such commissioner, or his successor.

The apparent lack of any solemn or ceremonial proceedings connected with the issuance of these commissions, and more especially the fact that the officer so appointed apparently holds his office solely at the pleasure of the commanders of The Salvation Army, are, in my opinion, fatal to the claim that this method of commissioning officers amounts to or is the equivalent of ordination. The conception that one man may at his pleasure ordain ministers, and, again, at his pleasure reduce them to laymen, is, I believe, contrary to the whole idea of ordination as it was and is understood in this Commonwealth.

2. What constitutes a denomination for the purpose of ordination of ministers who may perform a marriage in this Commonwealth?

I have already stated my opinion upon this point while considering the general principles to be applied to the other more specific questions which you ask.

3. Do pastors of unincorporated, independent religious bodies unconnected with any central governing body or conference, have authority to perform a marriage, within the meaning of G. L., c. 207, § 38?

In the general form in which you state it, it is, I believe, impossible to answer this question “yes” or “no.” There is nothing in the various facts supposed by you in your question which would, of itself, prevent such a religious body from being a denomination within the meaning of the statute. Each case, however, must be determined on its specific facts. Obviously, some form of organization, some established rules and some established usage must exist in order that it could be said that a representative of such a society was “a minister of the gospel ordained according to the usage of his denomination.”

4. Is an ordained clergyman who has resigned his pastorate and retired, but who occasionally officiates at funerals and like ceremonies, authorized to perform a marriage?

5. Is an ordained clergyman who has given up his pastorate to engage in business other than that connected with the ministry, but who sometimes acts at funerals and like ceremonies, authorized to perform a marriage?

Your fourth and fifth inquiries may be considered together. In each the issue is the same: Can the clergyman in question, upon all the facts of the case, fairly be said to be one "who resides in the Commonwealth and continues to perform the functions of his office?" In my opinion, it is not sufficient that he remain in good standing upon the records of his church. In addition, it must appear that he is in fact continuing to perform the functions of his office. The mere fact that he engaged in other pursuits would not, of course, prevent him from coming within the terms of the statute. In your fourth inquiry, however, you use the word "retired," and in your fifth inquiry the expression "who has given up his pastorate to engage in business." This would suggest that in neither case could it fairly be said that the clergyman in question was continuing to perform the functions of his office. The issue is, however, in each whether this can or cannot fairly be said, in the light of all the concrete circumstances of that particular case.

CONSTITUTIONAL LAW—EDUCATION—COLLEGE—DEGREES
—INSTRUCTION BY PROFESSORS OF INSTITUTIONS CHARTERED UNDER THE LAWS OF A FOREIGN STATE.

The provisions of G. L., c. 266, § 89, prevent institutions chartered under the laws of a foreign State from coming into Massachusetts for the purpose of enrolling students to receive personal class instruction here for which degrees are offered, even though the instructors are visiting professors from the institutions in question.

Such method of instruction is not interstate commerce within the principle laid down in the case of *International Textbook Co. v. Pigg*, 217 U. S. 91, and accordingly constitutes doing business within this Commonwealth, and therefore is subject to its laws.

You request my opinion on the following questions: —

To the Commissioner of
Education,
1923
May 15.

1. May institutions chartered under the laws of a foreign State come into Massachusetts for the purpose of enrolling students to receive personal class instruction here for which degrees are offered, even though the instructors are visiting professors from the institutions in question?

2. Does this method of instruction come within the principle laid down in the case of the *International Textbook Co. v. Pigg*, 217 U. S. 91?

G. L., c. 266, § 89, provides as follows: —

Whoever, in a book, pamphlet, circular, advertisement or advertising sign, or by a pretended written certificate or diploma, or otherwise in writing, knowingly and falsely pretends to have been an officer or teacher, or to be a graduate or to hold any degree, of a college or other educational institution of this commonwealth or elsewhere, which is authorized to grant degrees, or of a public school of this commonwealth, and whoever, without the authority of a special act of the general court granting the power to give degrees, offers or grants degrees as a school, college or as a private individual, alone or associated with others, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. Any individual, school, association, corporation or institution of learning, not having power to confer degrees under a special act of the general court, using the designation of "university" or "college" shall be punished by a fine of one thousand dollars; but this shall not apply to any educational institution whose name on July ninth, nineteen hundred and nineteen, included the word "university" or "college."

A literal interpretation of this statute would seem to forbid any individual, school, association, corporation or

institution of learning, not having the power to confer degrees under a special act of the General Court of this Commonwealth, from offering or granting degrees as a school, college or private individual, and would also seem, by its terms, to prohibit the use of the designation of "university" or "college" by any individual, school, association, corporation or institution of learning not having the power to confer degrees under a special act of the General Court, subject to the exception therein contained relative to an educational institution whose name on July 9, 1919, included the word "university" or "college."

This statute has been construed in the case of *Commonwealth v. New England College of Chiropractic*, 221 Mass. 190, wherein the court says: —

Its obvious purpose is to suppress the kind of deceit which arises from the pretence of power to grant academic degrees, and to protect the public from the evils likely to flow from that variety of misrepresentation and imposition. . . . It aims to ensure to the people of the Commonwealth freedom from deception, when dealing with those who put forward professions of educational achievement such as ordinarily is accompanied by a collegiate degree from an institution authorized to grant it and to make certain that those who use such symbols have had the opportunity of being trained according to prevailing standards in some school of recognized standing, under teachers of reputation for learning. . . .

The statute should be interpreted in the light of its design to effectuate its purpose so far as the words used reasonably construed permit of this result.

I am accordingly of the opinion that your first question must be answered in the negative.

The Supreme Court of the United States has decided, in the case of *International Textbook Co. v. Pigg*, *supra*, that where there was a continuous interstate traffic in textbooks and apparatus for a course of study, pursued by means of correspondence, the movements in interstate commerce bring the subject-matter within the domain of Federal control, and exempt it from the burden imposed by State legislation. (See VII Op. Atty. Gen. 52.) In this respect

the method of instruction outlined in your first question does not come within the principle laid down in the case of *International Textbook Co. v. Pigg*, *supra*, and would accordingly constitute "doing business" within this Commonwealth, and therefore be subject to its laws. See *International Textbook Co. v. Connelly*, 124 N. Y. Supp. 603; *International Textbook Co. v. Gillespie*, 229 Mo. 397; *International Textbook Co. v. Lynch*, 81 Vt. 101; *International Textbook Co. v. Peterson*, 133 Wis. 302; *Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.* 252 U. S. 436, and cases cited.

CREDIT UNIONS — SMALL LOANS — LICENSE.

A credit union is not engaged in the business of making small loans, within the meaning of G. L., c. 140, § 96, and is not required to obtain a license from the Commissioner of Banks.

You request my opinion upon the following question:

To the Supervisor of Loan Agencies.
1923
May 17.

Do credit unions fall within the provisions of the small loans act, and are they required to secure a license from the Commissioner of Banks, under G. L., c. 140, § 96?

The act authorizing the incorporation of credit unions was approved May 21, 1909 (St. 1909, c. 419). Section 25 of said chapter provides, in part, that "the provisions of chapter six hundred and five of the acts of the year nineteen hundred and eight shall apply." St. 1908, c. 605, is an act entitled "An Act to regulate further the business of making small loans." Section 1 of that act provides: —

No person, firm or corporation shall engage in the business of making small loans of two hundred dollars or less upon which a rate of interest greater than twelve per cent per annum is charged, and for which no security, other than a note or contract with or without an endorser is taken, without first obtaining a license for carrying on such business in the city or town in which the business is to be transacted. . . .

Sections 2 and 3 of said chapter 605 regulate the amount of the loan and interest.

Considering these two acts together, it is clear that the Legislature intended to require of credit unions the securing of a license before making loans, and to place a limitation on the amount of interest to be charged.

From the opinion of the Attorney General to the then Supervisor of Loan Agencies dated August 16, 1912, to which my attention has been called, it appears that the Attorney General was of the opinion that credit unions were required to secure a license under St. 1911, c. 727, § 3 (now G. L., c. 140, § 96), which provided:—

No person, partnership, corporation, or association shall directly or indirectly engage in the business of making loans of three hundred dollars or less, . . .

It also appears that that opinion was based upon the fact that St. 1909, c. 419, expressly made St. 1908, c. 605, applicable to credit unions. But Gen. St. 1915, c. 268, entitled "An Act relative to the incorporation and management of credit unions," repealed St. 1909, c. 419, and also St. 1914, c. 437, the latter chapter relating to rural credits. Gen. St. 1915, c. 268 (now G. L., c. 171 — Credit Unions), contains no provision, as did the statute of 1909, which in any way connects the small loans act with credit unions, unless it be G. L., c. 140, § 96 (St. 1911, c. 727, § 3), above referred to.

The question presented, therefore, is: Is a credit union engaged in the business of making loans, and thereby required to secure a license?

G. L., c. 171, § 5, provides:—

A credit union may receive the savings of its members in payment for shares or on deposit; may lend to its members at reasonable rates, or invest, as hereinafter provided, the funds so accumulated; and may undertake such other activities relating to the purpose of the association as its by-laws may authorize. Section forty-eight of chapter one hundred and seventy shall not apply to credit unions.

Section 13 provides that the directors shall determine the rate of interest on loans and deposits. Section 11 provides that the *members* shall fix the maximum amount to be loaned any one member. Section 11 also provides that the *members* may at any annual or special meeting review any decision of the credit committee or of a board of directors by a three-fourths vote of the *members* present and entitled to vote. Section 20 provides the amount of interest that may be charged on farm lands, but no limitation is placed upon other loans. Section 23 provides for a distribution of dividends among the *members*. A credit union can lend to *members* only. V Op. Atty. Gen. 40.

It is significant that the former statutory provision that the small loans act should apply to credit unions was specifically repeated in 1915. It is obvious that loans to members of a credit union will, in many instances, be \$300 or less, but, in my judgment, such transactions cannot be construed as "being engaged in the business of making small loans." A credit union is not carried on for profit. In fact, money earned is divided among the members in the way of dividends.

In my opinion, the small loans act does not now apply to credit unions, and it follows that a license is unnecessary.

I am also of the opinion that G. L., c. 140, § 114, does not include credit unions.

FIREARMS — MINORS — RIFLE CLUBS.

Under G. L., c. 140, § 130, as amended by St. 1922, c. 485, § 8, rifle clubs made up of minors may be supplied with firearms and directed in their proper use by competent adult instructors, without violation of law.

You state that the Ordnance Department, Massachusetts National Guard, is interesting itself in the organization of junior rifle clubs, and you request information as to whether the formation of such rifle clubs, made up of minors, for target practice only, under responsible adult supervision,

To the Adjutant General.
1923
May 18.

in any way violates any existing law of this Commonwealth.

G. L., c. 140, § 130, as amended by St. 1922, c. 485, § 8, provides as follows:—

Whoever sells or furnishes to a minor under the age of fifteen, or to an unnaturalized foreign born person who has not a permit to carry firearms under section one hundred and thirty-one, any firearm, air gun or other dangerous weapon or ammunition therefor shall be punished by a fine of not less than ten nor more than fifty dollars, but instructors and teachers may furnish military weapons to pupils for instruction and drill.

I am accordingly of the opinion that under this statute such junior rifle clubs may be supplied with firearms and drilled in their proper use by competent adult instructors, without violation of law.

BOARD OF CONCILIATION AND ARBITRATION — JURISDICTION
— MIDDLESEX & BOSTON STREET RAILWAY COMPANY.

The question whether an employer, by entering into an agreement with his employees, had limited his right, as a matter of law, to discharge his employees, is a judicial question; and the Board of Conciliation and Arbitration has no jurisdiction, under G. L., c. 150, § 5, to take any action upon such question.

To the Board
of Conciliation
and Arbitration.
1923
May 19.

You have requested my opinion as to whether the Board of Conciliation and Arbitration has jurisdiction to hear and consider certain matters under G. L., c. 150, § 5, relative to a controversy between the Middlesex & Boston Street Railway Company and its employees. You state that the facts are as follows:

An agreement entered into between the company and its employees provides, in part, that whenever any questions arise which cannot be mutually adjusted they shall be submitted, at the request of either party, to a board of arbitration, to be selected in a certain manner. Prior to this agreement, the company had promulgated a rule relative to liability for collision of cars, which was posted on the company's premises and which provided that any person violating the rule would be discharged. The agree-

ment made no reference to the rule. An employee was discharged by reason of a car operated by him colliding with another car, and a controversy arose relative to his discharge. The employees requested the company to submit the rule itself to arbitration, and the company refused. Under G. L., c. 150, § 5, the employees petitioned the Board of Conciliation and Arbitration to give a hearing and make a decision upon the responsibility for the collision and upon the severity of the penalty. The company contends that the agreement was made in the light of the said rule and was modified by it, and that the board has no jurisdiction to consider the question whether the penalty imposed upon the employee was too severe.

The precise question upon which you request my opinion is whether the board has jurisdiction to give a hearing and make a decision upon the rule itself, assuming that the employee was responsible for the collision.

G. L., c. 150, § 5, confers jurisdiction, under certain circumstances, upon the board to give a hearing and make a decision in a controversy "not involving questions which may be the subject of an action at law or suit in equity." This controversy involves the question whether the company, by entering into an agreement with its employees, had limited its right as a matter of law to discharge its employees. That is a judicial question.

I am therefore of the opinion that the controversy involves a question "which may be the subject of an action at law or suit in equity," and that you have no jurisdiction to take any action with respect to the rule itself against the will of the company.

CONSTITUTIONAL LAW — POLICE POWER — REGISTRATION
OF DEALERS IN MILK.

The right of the Legislature, under the police power, to regulate the lawful business of individuals is subject to the limitations that it must be reasonable and not arbitrary, and that the regulation must be for the benefit of the public at large. The question whether a statute interfering with the right to carry on business is a proper exercise of the police power is subject to judicial review.

A statute requiring persons engaged in the business of distributing milk to secure a rating by some credit agency, or to give a bond upon such terms as a State official may require, or to furnish a sworn financial statement of condition and to be subject to a public rating, as a prerequisite to doing business, would be unconstitutional, if enacted.

To the House
Committee on
Agriculture.
1923
May 21.

You ask my opinion as to the constitutionality of House Bill No. 396, entitled "An Act to require registration of contractors and dealers in milk." The bill proposes to amend G. L., c. 94, by inserting after section 39 a new section, called Section 39A, which is, in part, as follows: —

All dealers and contractors engaged in the business of buying, handling, selling or delivering milk or cream, except producers who sell and deliver only milk produced by cows on their own farms, shall each year register with the commissioner of agriculture on or before the first day of February. Every application for registration shall be made on a form furnished by the commissioner and shall be accompanied by either evidence satisfactory to the commissioner that the applicant has a rating by a credit agency acceptable to said commissioner, or a bond in such terms and for such amount as the commissioner may require, or a sworn financial statement of the condition of the business of the applicant on the first day of January of the year for which the application is made.

The section further provides that the information so submitted shall be held confidential, that the Commissioner shall refuse to register an applicant until the requirements for registration have been met, and that the Commissioner shall annually send to the inspector of milk in each city and town a copy of the list of registered contractors and dealers in milk. The section continues: —

. . . No inspector of milk shall issue any license under the following two sections to contractors or dealers except those whose names are included in the list furnished by the commissioner. The commissioner

shall prepare a rating list of those registered dealers and contractors not rated by any acceptable credit agency or not bonded, and shall furnish a copy of such list to any citizen upon application. . . .

The section concludes with provisions for fines and penalties for failure to comply with the requirements of the section.

The right to pursue any lawful occupation to obtain a livelihood is secured to every one under the Constitution of Massachusetts and the Constitution of the United States. This right, however, is subject to reasonable regulation by the State in the exercise of the police power, in the interest of the public health, the public safety, the public morals and, in a more limited sense, in the interest of the public welfare. This general principle has been affirmed in innumerable decisions. *Commonwealth v. Alger*, 7 Cush. 53, 84-86; *Commonwealth v. Strauss*, 191 Mass. 545, 553; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 478; *Dewey v. Richardson*, 206 Mass. 430; *Lawton v. Steele*, 152 U. S. 133, 136, 137; *McLean v. Arkansas*, 211 U. S. 539; *Hall v. Geiger-Jones Co.*, 242 U. S. 539; 27 Harvard Law Review, 297.

There are many kinds of business the doing of which in this Commonwealth is regulated by statutes requiring persons engaged in the business to obtain a license from some public authority. Occupations so regulated include those of auctioneers (G. L., c. 100, § 2), transient vendors, hawkers and pedlers (G. L., c. 101, §§ 3, 22), brokers engaged in selling securities (St. 1921, c. 499, § 8), physicians and others whose profession or occupation is closely connected with the public health (G. L., c. 112), innholders, keepers of intelligence offices, dealers in second-hand automobiles, pawnbrokers and persons engaged in the business of making small loans (G. L., c. 140, §§ 2, 42, 59, 70, 96), and insurance agents (G. L., c. 175, § 163). Such requirements have been sustained by a number of decisions of our court. *Commonwealth v. Roswell*, 173 Mass. 119 (insurance agents); *Commonwealth v. Danziger*, 176 Mass. 290 (pawnbrokers);

Commonwealth v. Hana, 195 Mass. 262 (pedlers); *Commonwealth v. Porn*, 196 Mass. 326, 329 (physicians); *Dewey v. Richardson*, 206 Mass. 430 (makers of small loans). See also *Brazee v. Michigan*, 241 U. S. 340 (employment agencies); *Hall v. Geiger-Jones Co.*, 242 U. S. 539 (dealers in securities). Dealers in milk are now required, for the protection of the public, to obtain a license to sell milk (G. L., c. 94, § 40). Such a requirement is clearly constitutional. Cf. *Commonwealth v. Titcomb*, 229 Mass. 14.

In a few instances our statutes require persons engaged in certain occupations to give bonds for the protection of the public. Requirements of that sort are to be found in statutes relating to collection agencies (G. L., c. 93, §§ 24, 25), pilots (G. L., c. 103, § 14), public warehousemen (G. L., c. 105, §§ 1, 3) and private bankers (G. L., c. 169, §§ 2, 3). A statute of the State of New York requiring persons engaging in the business of receiving deposits of money for safe keeping or for transmission to obtain a license and give a bond was upheld in *Engel v. O'Malley*, 219 U. S. 128.

There seem to be two limitations upon the right of the Legislature, under the police power of the State, to regulate the lawful business of individuals. The first of the two limitations is that the statute must have been passed as a reasonable and appropriate exercise of the police power, and must not be an arbitrary interference with the right of the individual to do business. *Commonwealth v. Strauss*, 191 Mass. 545, 553; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474; *Opinion of the Justices*, 220 Mass. 627; *Lochner v. New York*, 198 U. S. 45, 56; *McLean v. Arkansas*, 211 U. S. 539; *Smith v. Texas*, 223 U. S. 630; *Adams v. Tanner*, 244 U. S. 590. The second of the two limitations is that the regulation must be for the benefit of the public at large. *Commonwealth v. Strauss*, 191 Mass. 545, 553; *Opinion of the Justices*, 220 Mass. 627, 632. In the former case the court said:—

The question is whether, at the time of the passage of this statute, there were conditions actually existing or reasonably anticipated which called for such legislative intervention in the interest of the general public.

The rule that the police power of a State is subject to the two limitations stated is clearly enunciated in the case of *Lawton v. Steele*, 152 U. S. 133, 137, in the following language:

To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.

The question whether a statute interfering with the right to carry on business is a proper exercise of the police power is subject to judicial review. *Wyeth v. Cambridge Board of Health*, 200 Mass. 474; *Lawton v. Steele*, 152 U. S. 133, 137; *Lochner v. New York*, 198 U. S. 45, 56, 57; *Adams v. Tanner*, 244 U. S. 590, 596.

An exception to the general rule that a restriction of the right to carry on a lawful occupation must be for the benefit of the general public seems to be made in *Engel v. O'Malley*, 219 U. S. 128. The court there held that the statute was constitutional, although passed, apparently, for the benefit of a particular class, that class being ignorant and helpless depositors, largely foreign, and peculiarly in need of protection by the Legislature. The court said (pp. 136, 137):—

The *quasi*-paternal relations shown in argument and by documents to exist between those following the plaintiff's calling and newly-arrived immigrants justifies a supervision more paternal than is needed in ordinary affairs.

In my judgment, no general principle by which different classes of the community may be singled out for special benefits is to be deduced from this case.

Milk dealers are already required to take out licenses, issued by milk inspectors, for the protection of the general public from danger of impure milk. The obvious purpose of the proposed statute is to impose further restrictions upon dealers for the protection of producers of milk by paternalistic provisions requiring persons engaged in the business of distributing milk to secure a rating of some credit agency, or to give bonds the conditions of which are entirely within the discretion of the Commissioner, or to make statements disclosing the condition of their business and then to be subject to a public rating by the Commissioner. If such requirements are constitutional, they may be applied to many industries carried on in the Commonwealth. They are not for the benefit of the community at large, but for the class of milk producers only.

A somewhat similar statute enacted by the Legislature of the State of Maine was held to be unconstitutional in *State v. Latham*, 115 Me. 176. The court there held a statute, requiring persons purchasing cream or milk for the purpose of reselling or manufacturing into other products to pay the producers semimonthly, to be unconstitutional. They said it gave the milk producer a strong club to aid in the collection of debts which is not given to other creditors, that there was no reasonable ground of discrimination between producers of milk and producers of hay, potatoes, oats or other products; that grocery men and dealers in dry goods might with equal reason be given similar aid in collecting their bills; and that the statute was class legislation, with discriminations not based upon any real difference in situation or condition.

I am of opinion that these considerations are equally applicable to the bill before me. If, for the benefit of the milk producers, milk dealers should be required to furnish information as to their financial standing, or a bond, then there is no reason why similar disclosures and undertakings should not be given by dealers in other commodities for the benefit of producers and manufacturers. Such require-

ments, however, would in large measure hamper the doing of lawful business and arbitrarily restrict persons in their right to carry on such business. In my opinion, such restrictions are outside the line of what is permissible.

The bill may be criticized also because it makes no provision whatever as to the amount of the bond and the conditions under which it is to be given, and because the other requirements could not be met by any person not having an established business. I do not, however, base my ruling on these objections to the proposed measure, but on the fundamental objections which I have stated.

CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWERS TO ADMINISTRATIVE OFFICIALS — UNFAIR DISCRIMINATION — REGULATION OF DEALERS IN MILK AND CREAM.

An act authorizing the secretary of the Department of Agriculture to make such rules and regulations as he sees fit for dealers in milk and cream, without other limitation upon the power delegated than that such rules and regulations should be "in the interest of the public health and welfare," would amount to a delegation to an administrative official of the power to enact legislation, and would be contrary to the Constitution of Massachusetts.

An act for the regulation of dealers in milk and cream, that applies only to dealers "who buy, purchase, receive or collect said milk or cream to be sold, delivered or exposed for sale at a point more than six miles from the point of collection or receipt or purchase," makes an unreasonable and arbitrary discrimination, which would render the act unconstitutional.

An act, the dominant purpose of which is to impose restrictions upon milk dealers for the financial protection of milk producers, by requiring the former to secure a license and give a bond, the terms of which are wholly within the discretion of an administrative official, would be unconstitutional; that purpose being one which it is beyond the constitutional powers of the Legislature to effectuate.

There has been transmitted to me a copy of the order adopted by the House of Representatives requesting my opinion as to whether House Bill No. 334, if enacted into law, would be constitutional. In my opinion, it would not.

The bill is in the following terms: —

To the
House of Rep-
resentatives.
1923
May 22.

AN ACT TO AUTHORIZE THE SECRETARY OF THE DEPARTMENT OF AGRICULTURE TO MAKE RULES AND REGULATIONS IN REGARD TO THE COLLECTING, RECEIPT AND PURCHASE OF MILK OR CREAM IN CERTAIN INSTANCES.

SECTION 1. The secretary of the department of agriculture shall make and issue rules and regulations to all dealers in milk or cream, who buy, purchase, receive, or collect said milk or cream to be sold, delivered, or exposed for sale, at a point more than six miles from the point of collection or receipt or purchase.

SECTION 2. The secretary of the state board of agriculture may make such examination as he deems fit, into the financial responsibilities of dealers of milk or cream who come under the provisions of this act. And shall by the issuing of a license, or permit to do business, or the requiring of a bond, secure the obedience to such rules and regulations as he may make in the interest of the public health and welfare.

SECTION 3. Any person, firm, partnership or association who shall collect, receive, or buy, cream or milk, the same to be sold, delivered, or exposed for sale, at a point not less than six miles from the point of collection, receipt or purchase, who has not first received from the secretary of the state board of agriculture such license or permit, as the secretary may demand, shall forfeit a sum not to exceed five hundred dollars for each offence.

The bill purports to give to the secretary of the Department of Agriculture what appears to be undefined and almost unlimited power to "make such rules and regulations" as he sees fit, for dealers in milk and cream. No limitation is imposed upon his discretion beyond the provision contained in the last sentence of section 2, that the rules and regulations made by him shall be "in the interest of the public health and welfare."

The power to enact laws is vested exclusively in the General Court, except so far as modified by the initiative and referendum amendment, and cannot be surrendered or delegated to any other agency. *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 481; *Opinion of the Justices*, 239 Mass. 606. As was said in the latter opinion (pages 610, 611):—

It is a power which cannot be surrendered or delegated or performed by any other agency. The enactment of laws is one of the high prerogatives of a sovereign power. It would be destructive of fundamental conceptions of government through republican institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws.

There are no exceptions to the principle that the General Court cannot delegate, surrender or transfer to any other power the function of enacting statutes general in their scope and operation.

It is true that the Legislature may confer upon administrative officials the power, in the execution of a law, to formulate rules, determine facts and exercise a limited discretion in matters of detail; but the power so granted is not to frame a general rule of law, but to apply a rule, when enacted, to particular situations. In my judgment, the proposed legislation in this respect goes far beyond the permitted line, and would be contrary to the Constitution of this Commonwealth.

Furthermore, the bill is applicable only to dealers "who buy, purchase, receive, or collect said milk or cream to be sold, delivered, or exposed for sale, at a point more than six miles from the point of collection or receipt or purchase." There appears to be no sound basis for such a distinction between dealers. In my opinion, the discrimination thus made is unreasonable and arbitrary, and therefore unconstitutional. *Commonwealth v. Hana*, 195 Mass. 262, 266, 267; V Op. Atty. Gen. 56.

A further ground of invalidity is that it is manifest, from section 2, that the dominant purpose of the proposed act is to impose restrictions upon milk dealers for the financial protection of milk producers, by requiring persons engaged in the business of distributing milk to secure a license and give a bond, the terms of which are wholly within the discretion of an administrative official. That purpose is one which, in my opinion, it is beyond the constitutional power of the Legislature to effectuate. The matter is considered at

length in an opinion rendered by the Attorney General on the constitutionality of House Bill No. 396, at the request of the committee on agriculture. VII Op. Atty. Gen. 164.

INSURANCE — BROKER'S LICENSE — FEE — VETERAN —
SERVICE IN THE ARMY OR NAVY OF THE UNITED STATES
"IN TIME OF WAR OR INSURRECTION" — PUNITIVE
EXPEDITION INTO MEXICO.

An applicant for an insurance broker's license under G. L., c. 175, § 166, is not exempt from paying the fee prescribed by said section, on the ground that he was a member of the Massachusetts National Guard, which was in the service of the Federal government during the punitive expedition into Mexico in 1916.

Such service does not constitute service in the Army or Navy of the United States "in time of war or insurrection," within the meaning of said statute.

To the Com-
missioner of
Insurance.
1923
May 22.

You request my opinion as to whether a certain applicant for an insurance broker's license under G. L., c. 175, § 166, is exempt from paying the fee prescribed by said section, on the ground that the applicant in question was a member of the Second Regiment, Company C, of the Massachusetts National Guard, which was in the service of the Federal government during the punitive expedition into Mexico several years ago. The applicant contends that his service in this regiment on this occasion entitles him to exemption from the fee.

G. L., c. 175, § 166, provides, in part, as follows:—

The commissioner may, upon the payment of a fee of ten dollars, issue to any suitable person of full age resident in the commonwealth, or resident in any other state granting brokers' licenses or like privileges to residents of the commonwealth, a license to act as an insurance broker to negotiate, continue or renew contracts of insurance or annuity or pure endowment contracts, or to place risks, or effect insurance with any qualified domestic company or its agents, or with the lawfully constituted and licensed resident agents in this commonwealth of any foreign company duly admitted to issue such policies or contracts therein upon the following conditions: . . . No fee for a license issued hereunder shall be required of any soldier, sailor or marine resident in this commonwealth

who has served in the army or navy of the United States in time of war or insurrection and received an honorable discharge therefrom or release from active duty therein, if he presents to the commissioner satisfactory evidence of his identity.

The decision of your question accordingly rests upon whether or not the service of the applicant on the Mexican border constitutes service in the Army or Navy of the United States "in time of war or insurrection," within the meaning of said statutes.

U. S. Const., art. 1, § 8, prescribes the methods of declaring war in the following language:—

The congress shall have power . . . to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;— to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;— to provide and maintain a navy;— to make rules for the government and regulation of the land and naval forces;— to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;— to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress; . . .

It is evident that at the time of this emergency in 1916 the Congress of the United States never declared war on Mexico as prescribed in the Constitution. The language of Congress, contained in Public Laws, 1916, c. 211, is indicative of how the emergency was considered at the time, namely:—

Joint Resolution to authorize the President to draft members of the National Guard and of the organized militia of the several states, territories, and the District of Columbia and members of the National Guard and Militia Reserves into the military service of the United States under certain conditions, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in the opinion of the Congress of the United States an emergency now exists which demands the use of

troops in addition to the regular army of the United States and that the President be, and he is hereby, authorized to draft into the military service of the United States . . . any or all members of the National Guard and of the organized militia of the several states, territories and the District of Columbia and any and all members of the National Guard and organized militia reserves, to serve for the period of the emergency, . . .

SEC. 4. That whenever in time of war or public danger or during the emergency declared in section one of this resolution, . . .

Approved, July 1, 1916.

It is to be observed that in said resolution Congress refers to the 1916 Mexican border service as an emergency and not a war. The wording of U. S. Public Laws, c. 143, enacted July 9, 1918, at page 873, is likewise significant of the manner in which the United States government considers the Mexican border service. This section reads, in part, as follows:—

That the Secretary of War be, and he is hereby, authorized and directed to procure a bronze medal, . . . to be presented to each of the several officers and enlisted men, . . . of the National Guard who, under the orders of the President of the United States, served . . . in the war with Spain, . . . and who served on the Mexican border in the years nineteen hundred and sixteen and nineteen hundred and seventeen and who are not eligible to receive the Mexican service badge heretofore authorized by the President; . . .

The phraseology used in bestowing honors upon those who participated in the Mexican border service indicates that a distinction is made between that service which our National Guard performed under the call of the President in 1916, and the service in a war. The statute designates specifically a medal for service "in the war with Spain," while the medal for those who went into Mexico is called "the Mexican service badge," and the medal for those who served on the border is specified as the medal for those "who served on the Mexican border."

There appears to be a sound distinction between the

existence of "a state of war" and "time of war," especially as relating to the government of soldiers and the jurisdiction of military law. Accordingly, it was held in a report of the Judge Advocate General, dated March 21, 1905 (c. 17609), approved by Secretary Taft, that the operations of the expeditionary force in China constituted a condition of war, so that a soldier, who deserted during said operations, deserted in time of war, and therefore was not entitled to the benefit of the statute of limitations.

While it was not contended that at any time the United States and the Imperial Government of China were at war, it was held that we were prosecuting our right to protect our representatives from the body of Chinese who were seeking to capture or kill them, and, accordingly, a state of war existed within the meaning of the statutes; the parties to the war, so far as concerned us, being on the one side the United States and on the other a certain proportion of the inhabitants of the Chinese Empire who were, from representation of the Imperial Chinese Government, in revolt.

Similarly, after the ratification of the treaty of peace with Spain, the United States was regarded as at peace, except locally in the Philippine Islands, where a state of war legally continued until peace was proclaimed therein by the President. (See VI Op. Atty. Gen. 407.)

In an opinion of the Judge Advocate General, dated May 9, 1916, to the Adjutant General (Opinions Judge Advocate General, 99-001), on the following question: "Before what tribunal should a member of the expedition in Mexico be tried for murder or rape?" Judge Advocate General E. H. Crowder says:—

I am therefore of the opinion that while war is not recognized as existing between the United States and Mexico, the actual conditions under which the field operations in Mexico are being conducted are those of actual war; that within the field of operations of the expeditionary force in Mexico, it is "time of war" within the meaning of the 58th Article of War; and that the crimes mentioned in that article should therefore be

tried by general court-martial in accordance with its provisions. The opposite ruling would give immunity for the capital crimes specified in the 58th Article of War, since it could not have been intended that, under such conditions, United States soldiers would be turned over to the authorities of Mexico for trial.

A similar question arose in California where, in construing section 1¼ of art. XIII of the California State Constitution, — which provides: “The property to the amount of one thousand dollars of every resident in this state who has served in the Army, Navy, Marine Corps or Revenue Marine Service of the United States in time of war, and received an honorable discharge therefrom; . . . shall be exempt from taxation,” — the Attorney General of the State of California ruled that “the trouble on the Mexican border was not a ‘war’ within the meaning of that constitutional provision.” See Digest of Opinions, Judge Advocate General, p. 119, 1919.

I am accordingly of the opinion that the military service of the applicant for the insurance broker’s license under G. L., c. 175, § 166, as outlined in your communication, does not exempt him from paying the fee prescribed by said section, inasmuch as said service did not constitute service in the Army or Navy of the United States “in time of war or insurrection,” within the meaning of the statute.

TAXATION — EXEMPTION — PROPERTY OF GRAND ARMY OF THE REPUBLIC.

Under G. L., c. 59, § 5, cl. 5th, as amended by St. 1921, c. 474, and by St. 1922, c. 222, portions of a building belonging to a post of the Grand Army of the Republic, which are let to tenants, are not exempt from taxation, and should be separately valued and taxed.

To the Com-
missioner of
Corporations
and Taxation.
1923
May 23.

You have requested my opinion, under the provisions of G. L., c. 58, § 1, whether real estate belonging to a post of the Grand Army of the Republic Corporation located in Springfield, the total valuation of which is below \$100,000,

is exempt from taxation under G. L., c. 59, § 5, cl. 5th, as amended. The assessors report to you that the income from said real estate "is used entirely in the care and upkeep of the property, interest on loans, insurance, etc." By a subsequent communication you have been advised that the real estate consists of a brick block divided into a number of rooms, some of which are leased at a monthly rental to other fraternal organizations and others are rented at times when not in use.

G. L., c. 59, § 5, cl. 5th, as amended by St. 1921, c. 474, and by St. 1922, c. 222, is as follows: —

The real and personal estate belonging to or held in trust for the benefit of incorporated organizations of veterans of any war in which the United States has been engaged, to the extent of one hundred thousand dollars, if actually used and occupied by such association, and if the net income from said property is used for charitable purposes; but it shall not be exempt for any year in which such association or the trustees holding for the benefit of such association wilfully omit to bring in to the assessors the list and statement required by section twenty-nine.

Clause 5th is an offshoot from the provisions appearing in G. L., c. 59, § 5, cl. 3rd, which, omitting the exceptions, is as follows: —

Personal property of literary, benevolent, charitable and scientific institutions and of temperance societies incorporated in the commonwealth, the real estate owned and occupied by them or their officers for the purposes for which they are incorporated, and real estate purchased by them with the purpose of removal thereto, until such removal, but not for more than two years after such purchase, except as follows: . . .

In the Public Statutes the provisions corresponding to the above-quoted portion of clause 3rd (P. S., c. 11, § 5, cl. 3rd) were as follows: —

The personal property of literary, benevolent, charitable, and scientific institutions incorporated within this commonwealth, and the real estate belonging to such institutions, occupied by them or their officers for the purposes for which they were incorporated; but such real estate, when

purchased by such a corporation with a view to removal thereto, shall not, prior to such removal, be exempt for a longer period than two years:

. . .

This clause was amended and a provision exempting personal property and real estate of Grand Army and veteran associations was first made by St. 1889, c. 465. Section 1 of that statute is as follows: —

The personal property of literary, benevolent, charitable and scientific institutions and temperance societies incorporated within this Commonwealth, and the real estate belonging to such institutions occupied by them or their officers for the purposes for which they were incorporated; but such real estate when purchased by such a corporation with a view to removal thereto, shall not, prior to such removal, be exempt for a longer period than two years; but none of the real or personal estate of such corporations organized under general laws shall be exempt when any portion of the income or profits of the business of such corporations is divided among their members or stockholders or used or appropriated for other than literary, educational, benevolent, charitable, scientific or religious purposes. The personal property and real estate belonging to grand army and veteran associations incorporated within this Commonwealth for the purpose of owning property for the use and occupation by posts of the grand army of the republic shall, to the extent of twenty thousand dollars, if the same shall be in actual use and occupation by such associations, be deemed to be the property of charitable institutions, and exempt from taxation, provided the net income from said property is used for charitable purposes in aid of needy soldiers of the war of the rebellion, and their dependents.

The last sentence, exempting from taxation under the circumstances stated personal property and real estate belonging to Grand Army and veteran associations, appears as a reenactment in R. L., c. 12, § 5, cl. 5th. That provision has reached its present form by successive amendments. So far as I have knowledge, G. L., c. 59, § 5, cl. 5th, has not been construed either by the court or by the Attorney General. Cases involving the construction of the provisions of clause 3rd have, however, frequently been before the court, and the language of the two clauses is sufficiently similar

so that those decisions have a considerable bearing on the question concerning which you have asked my opinion.

The particular phrases of the two clauses which, for present purposes, should be set opposite each other and compared are these:—

Clause 3rd. "The real estate owned and occupied by them or their officers for the purposes for which they are incorporated."

Clause 5th. "The real . . . estate belonging to incorporated organizations of veterans . . . , if actually used and occupied by such association, and if the net income from said property is used for charitable purposes."

The cases of which I have spoken emphasize two conditions which must be met in order that real estate may be exempt under clause 3rd. The first is that it must be owned and occupied by the institution, and the second is that it must be occupied for the purpose for which the institution is incorporated. Cases applying to the latter condition are the following: *Chapel of the Good Shepherd v. Boston*, 120 Mass. 212; *Mount Hermon Boys' School v. Gill*, 145 Mass. 139; *Salem Lyceum v. Salem*, 154 Mass. 15; *Phillips Academy v. Andover*, 175 Mass. 118; *Emerson v. Trustees of Milton Academy*, 185 Mass. 414. This condition, obviously, has no application to clause 5th.

But other cases under clause 3rd have dealt with the question—what is a sufficient occupation by an institution to exempt its real estate; and these cases, it seems to me, are directly applicable to the question before me. In *Charlesbank Homes v. Boston*, 218 Mass. 14, the plaintiff was a charitable corporation owning a large model apartment house containing apartments which it leased to tenants for small rents. The court held that the tenants were strictly tenants, who were themselves the occupants of their apartments, that "there must be an actual occupation by the corporation or its officers before the purpose of that occupation can be considered," and that the real estate upon which the tax was imposed was not exempted from taxation,

because it was not occupied by the plaintiff corporation but was occupied by its tenants. This case was followed and applied in *Babcock v. Mores Home for Infirm Hebrews*, 225 Mass. 418.

In my opinion, these cases are decisive of the present question. Indeed, the language of clause 5th in that respect is somewhat stronger, because the real estate to be exempt must be "*actually used* and occupied by such association." It is not sufficient that the net income from the property is used for charitable purposes. That is a second condition imposed by clause 5th to be considered after the first has been met. Cf. *Chapel of the Good Shepherd v. Boston*, 120 Mass. 212; *Salem Lyceum v. Salem*, 154 Mass. 15. But an occasional letting of a hall or other part of a building which is occupied by an institution or association is not inconsistent with an actual occupancy of that part of the building by the institution or association, so long as it remains in control of the premises. *Salem Lyceum v. Salem*, 154 Mass. 15, 17; *Emerson v. Trustees of Milton Academy*, 185 Mass. 414.

For the purpose of taxation those portions of the building which are let to tenants can be separated from the remaining parts occupied by the corporation, and separately valued and taxed. *Cambridge v. County Commissioners*, 114 Mass. 337.

I must advise you, therefore, that, in so far as any of the rooms in the building in question are let to other organizations as tenants, the property so occupied by them is not exempt, but that otherwise the property is exempt from taxation.

CONSTITUTIONAL LAW — DRAINAGE LAW.

The power of the State to provide for the improvement of low lands and swamps and the assessment of the expense on the owners, either in the exercise of the police power, where the benefits conferred are merely private, or in the exercise of the power of eminent domain and the taxing power, where a public purpose is served, has long been recognized.

You have transmitted to me for examination and report a bill, entitled "An Act concerning the improvement of low lands and swamps," which amends G. L., c. 252, as amended by St. 1922, c. 349, by striking out sections 1 to 14A, inclusive, and inserting in place thereof sixteen new sections. The general purpose appears to be to make adequate provision for the financing of improvements of wet lands by the formation of reclamation districts, and by giving to such districts authority either to request the county commissioners to pay, in the first instance, the expense involved in making proposed improvements, by issues of county bonds or notes, or to finance such expense by assessments upon the members of the districts or the issuing of district notes or bonds.

The power of the State to make provision for the improvement of meadows and low lands and the assessment of the expense on the owners, either in the exercise of the police power, where the benefits conferred are merely private, or in the exercise of the power of eminent domain and the taxing power, where a public purpose is served, has long been recognized. *Talbot v. Hudson*, 16 Gray, 417; *Lowell v. Boston*, 111 Mass. 454, 464-471; *Turner v. Nye*, 154 Mass. 579; *Wurts v. Hoagland*, 114 U. S. 606; III Op. Atty. Gen. 538. See Mass. Const. Amend. XLIX. In my opinion, the bill, if enacted into law, would be constitutional.

To the
Governor,
1923
May 24.

DEPARTMENT OF AGRICULTURE — OLEOMARGARINE —
INSPECTION — PEACEABLE ENTRY — SEARCH WARRANT.

Employees of the Department of Agriculture may, for the purpose of inspection, peaceably enter dwelling houses actually used in the manufacture, transportation or sale of oleomargarine.

Force may probably not be used to gain such entry.

When peaceable entry has been made, reasonable force may probably be used to make inspection.

A search warrant may not be issued to search for oleomargarine.

To the Com-
missioner of
Agriculture.
1923
May 24.

You have requested my opinion upon certain questions relative to the powers of employees of your department, under the provisions of G. L., c. 128, § 14, which provides, in part, as follows: —

The department and its employees shall have access to each place used in the manufacture, transportation or sale of dairy products or imitations thereof, and to each vessel and can be used in such manufacture, transportation and sale, . . .

Under these provisions the department and its employees have access only to places actually used in the manufacture, transportation or sale of dairy products or imitations thereof.

In my opinion, if a dwelling house is used for any of the purposes enumerated in the statute, the department and its employees have a right to enter for the purpose of inspection. *Dunn v. Lowe*, 203 Mass. 516, 517; G. L., c. 94, § 56. This applies, however, only to dwellings actually used for such purposes, and does not apply to dwellings merely suspected of being so used. The cases sustaining the right of officers authorized by statute to make entry for the purpose of inspection refer to peaceable entry. They do not hold that entry may be made by force against the will of the owner or occupant. Whether such entry would be lawful is left in doubt. (See VI Op. Atty. Gen. 288.) If, however, peaceable entry in the place used for the manufacture, transportation or sale of oleomargarine has been obtained, the court seems to intimate that an inspection

can be made even against the will of the owner. *Commonwealth v. Smith*, 141 Mass. 135, 139. This question, however, is not free from doubt.

By statute, search warrants may be issued to search for certain property. There is no provision authorizing the issuing of a search warrant to search for oleomargarine.

Answering your questions specifically, I am of the opinion that —

(1) Employees of your department may enter dwelling houses used in the manufacture, transportation or sale of oleomargarine for the purpose of inspection, but may not enter dwellings which are merely suspected of being, but are not actually, so used.

(2) Employees may probably not use force to gain entry to a dwelling so used against the will of the owner or occupant.

(3) Employees who gain peaceable entry to a dwelling so used may probably use reasonable force for the purpose of making an inspection when they are within the premises used for the manufacture, transportation or sale of oleomargarine.

(4) Under existing statutes, a search warrant may not be issued to search for oleomargarine.

CONSTITUTIONAL LAW — BRIDGE OVER HIGHWAY — OWNERSHIP OF FEE IN PUBLIC WAY.

It is within the constitutional power of the Legislature to enact a law conferring upon a city or town within this Commonwealth the power to grant permits or privileges to private individuals to erect structures which will bridge the public streets connecting premises owned on both sides of the street.

The Legislature has the power to authorize encroachments upon a public street if they deem it proper so to do, whether the municipality or the person seeking the permit or consenting thereto owns the fee of the street.

You have transmitted to me for examination and report House Bill No. 1491, entitled "An Act authorizing Lever Brothers Company to maintain a bridge over Burleigh

To the
Governor.
1923
May 24

Street in the city of Cambridge.” The proposed act is as follows:—

SECTION 1. Upon petition, after seven days’ notice inserted in at least one newspaper published in the city of Cambridge and a public hearing thereon, the city council of said city may, by a two-thirds vote, with the approval of the mayor, issue a permit to Lever Brothers Company of Cambridge, its successors and assigns, to build and maintain a bridge over Burleigh street in said city, for the purpose of connecting the buildings owned and occupied by said company on said Burleigh street. Said permit shall be granted upon such conditions and subject to such restrictions as the city council may prescribe. Any permit so issued may be revoked by vote of said city council, with the approval of the mayor.

SECTION 2. Any bridge built under a permit granted as aforesaid shall be constructed and maintained at a height not less than twenty-seven feet, six inches above the grade line of said street, and shall not be more than twenty feet in width, and no part of said bridge or its supports shall rest on the surface of the street.

SECTION 3. If a person sustains bodily injury or damage in his property by reason of the construction or maintenance of said bridge, he may recover damages therefor in an action of tort brought in the superior court against said Lever Brothers Company, or its successors or assigns, within one year after the date of such injury or damage; provided, that such notice of the time, place and cause of the said injury or damage be given to said Lever Brothers Company, or its successors or assigns, by, or on behalf of, the persons sustaining the same as is, under the provisions of chapter eighty-four of the General Laws, valid and sufficient in cases of injury or damage sustained by reason of a defect or a want of repair in or upon a way, if such defect or want of repair is caused by or consists in part of snow or ice, or both. The remedy herein provided shall not be exclusive, but shall be in addition to any other remedy provided by law.

SECTION 4. This act shall take effect upon its passage.

The question is presented whether such an act is within the constitutional power of the Legislature.

In 1911 the House of Representatives, having under consideration certain bills to authorize the construction of bridges over streets in the city of Boston, requested the opinion of the justices of the Supreme Judicial Court on several questions, of which one was whether it was “within the constitutional power of the Legislature to enact a law

conferring upon a city or town within this Commonwealth the power to grant permits or privileges to private individuals to erect structures which will bridge the public streets connecting premises owned on both sides of the street." *Opinion of the Justices*, 208 Mass. 603, 604. To this question the justices answered (p. 606): "Yes, if the private individuals own all the land upon or over which the structures are to be erected."

In the course of their opinion the justices gave the following reasons for their answer (pp. 605, 606):—

The Legislature represents the public, and at any time it may enlarge or limit public rights thus acquired, having due regard to private rights of property secured by the Constitution to all the people. *New England Telephone & Telegraph Co. v. Boston Terminal Co.*, 182 Mass. 397, 400. So far as the rights of the public in the street or way are concerned, the Legislature can do anything referred to in any of the questions, if the proposed legislation seems reasonable and proper.

So far as the abutters are concerned, the Legislature, without their consent can do or authorize nothing that takes away or impairs any valuable right in their property, unless the taking is for a public use, with compensation for that which is taken.

As against an adjoining landowner, one has no right to have the adjacent premises remain open for the admission of light and air. In the cases referred to in the first three questions, we assume that the owners of abutting land, upon or over which the structure would be erected, would desire the erection and would consent to it. It would, therefore, be made in their right, as well as with authority from the Legislature to make an encroachment upon the previously existing public right. The existence of this private right of the owner of the fee of the land over which the structure would be erected would preclude the owners of adjacent lands from having damage for an obstruction of light and air, possibly affecting their property abutting on other adjacent parts of the street.

The reasons thus stated involve three fundamental propositions: First, that so far as the rights of the public are concerned the Legislature can authorize the granting of a permit to private individuals to erect a bridge across a public street, if it seems to them reasonable and proper to do so (see *Union Inst. for Savings v. Boston*, 224 Mass. 286);

second, that the Legislature cannot authorize the taking of private rights in property unless the taking is for a public use, with adequate provision for compensation; and third, that no taking of any such right is made by the erection of a bridge across a public street except as against owners of the land upon or over which the structure is erected, and, that interference with light, air and prospect does not constitute the taking of an easement in adjoining land for which compensation must be made. See *Peabody v. Boston & Providence R.R. Corpn.*, 181 Mass. 76; *McKeon v. New England R.R. Co.*, 199 Mass. 292, 295, 296.

Upon receipt of the answer of the justices the House of Representatives propounded further questions to them. *Opinion of the Justices*, 208 Mass. 625. Two of their questions were as follows (p. 627):—

6. Would the provisions of said House Bill No. 817 be constitutional and would the provisions of the bill which forms the subject of the last question be constitutional if these bills were amended by striking out section three of the former bill and section four of the latter bill and substituting in the place of each of said sections the following section: "Any person owning property, or doing business in property abutting on Avon Street, whose property or business is damaged either through interference with light and air or otherwise by the construction or maintenance of a bridge constructed in accordance with the provisions of section one of this act, may have damages therefor determined by a jury upon petition to the Superior Court filed against the grantees of said permit within one year after the permit for the erection of said bridge is approved by the mayor, as provided in section one of this act."

7. If at any time after the enactment of such a bill and the issue of such permit and the construction or beginning of construction of such bridge under said permit any person using said street and passing under said bridge shall suffer any injury either to his person or to his property on account of the construction or maintenance of said bridge, as by the falling of material used in the construction of said bridge or by the falling of snow or ice from said bridge, will the city of Boston be liable for said injury?

To these questions the justices answered, in part, as follows (p. 630):—

The law covering the matters to which these questions relate was very fully stated in an *Opinion of the Justices* communicated to the House of Representatives on April 17, 1911, *ante*, 603, which appears by your order to be before the Honorable Senate.

It is elementary doctrine that such an amendment as is proposed, providing that the damages to persons injured in their property shall be paid by the grantees of the permit, who are private parties, would not secure compensation to such persons in the manner required by the Constitution and as to them, in reference to damages to which they might be entitled under the Constitution, would render the statute invalid. It is equally elementary law that cities and towns are not liable in damages to persons for injuries received from unsafe conditions, while travelling on a highway, unless there is a statute imposing a liability for such conditions.

In fact, the substituted section proposed in the sixth question was open not only to the objection pointed out by the justices, but also to the objection that since the buildings, on opposite sides of the street, to be connected by the proposed bridge were owned by the petitioners, there could be no person entitled to damages by reason of any taking, as the justices showed in their former opinion.

A bill containing similar provisions was held by my predecessor to be open to the objections stated in the latter opinion. VI Op. Atty. Gen. 52. Section 3 of that bill provided:—

Any person whose property is damaged by reason of the construction or maintenance of the bridge as aforesaid may have his damages determined by a jury, upon petition filed in the superior court within one year after the approval of the permit by the mayor as above provided, and the damages when so determined shall be paid by the said George L. Brownell.

The form of the bill was afterwards amended, and as so amended was approved by Your Excellency. St. 1921, c. 330. Section 3 of the act as passed is in form precisely similar to section 3 of the bill before me. It does not purport to provide for recovery of compensation by any one for a taking in the exercise of the power of eminent domain,

but merely to provide for the recovery of damages in an action of tort against the petitioner, occasioned to any person who suffers an injury to a legal right by reason of the construction or maintenance of the bridge.

In *Opinion of the Justices*, 208 Mass. 603, 606, their affirmative answer was on the hypothesis that the private individuals who were the petitioners owned all the land upon or over which the structures were to be erected. The justices assumed, apparently, that they owned the fee in the street. So in the case to which St. 1921, c. 330, relates, the petitioner was authorized to build and maintain a bridge over such portions only of the street as were owned by him or by the corporation owning the land on the opposite side of the street, to whose written consent the permit was subject. In the proposed act it does not appear that the petitioner owns the fee of the street. In my opinion, however, it is not necessary that it should. In accordance with the general principle stated by the justices in the first opinion referred to, the Legislature has power to authorize encroachments upon a public street if it deems it proper so to do, whether the municipality or the person seeking the permit or consenting thereto owns the fee of the street. St. 1921, c. 331, authorizes a permit for the erection of a bridge across a street for the purpose of connecting buildings owned and occupied by the corporation on opposite sides of the street, without any reference to the ownership of the fee in the street.

I advise you, therefore, that, in my opinion, there is no constitutional defect in the proposed act.

CONSTITUTIONAL LAW — LEGISLATIVE POWER AS TO COURTS — DISTRICT JUDGES SITTING IN THE SUPERIOR COURT.

It is within the constitutional power of the Legislature to modify, enlarge, diminish or transfer the jurisdiction of all courts subordinate to the Supreme Judicial Court.

An act providing that district judges shall sit at the trial of certain criminal cases in the Superior Court, when designated by the chief justice thereof, is constitutional.

You request me to consider House Bill No. 1466, entitled
 “An Act to provide for the more prompt disposition of
 criminal cases in the Superior Court.”

To the
Governor.
1923
May 25.

Mass. Const., c. I, § I, art. III, provides, in part: —

The general court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to be held in the name of the commonwealth, for the hearing, trying, and determining of all manner of crimes, offences, pleas, processes, complaints, actions, matters, causes, and things, whatsoever, arising or happening within the commonwealth, . . . whether the same be criminal or civil,
 . . .

Article IV of that section provides, in part: —

. . . full power and authority are hereby given and granted to the said general court, . . . to set forth the several duties, powers, and limits, of the several civil and military officers of this commonwealth, . . . so as the same be not repugnant or contrary to this constitution;
 . . .

In *Dearborn v. Ames*, 8 Gray, 1, 14, the court said: —

The power to erect courts and judicatories, coupled with an authority to define and limit the powers and duties of all civil officers, gives power to the legislature to fix and limit the jurisdiction of all such courts and judicatories. . . .

Under this power to erect judicatories, we think it has been the practice of the legislature, from the adoption of the Constitution, to erect and establish new judicatories, other than the supreme judicial court, to transfer jurisdiction from one court to another, in part or in whole, and to enlarge, restrain and regulate the jurisdiction of all courts.

In *Russell v. Howe*, 12 Gray, 147, 153, the court said: —

The probate court was a judiciary under the Constitution, and its jurisdiction might be modified, enlarged, diminished or transferred, *in the same manner as the jurisdiction of all other courts subordinate to the supreme judicial court.*

The proposed bill enlarges the jurisdiction of justices of district courts when assigned by the chief justice of the Superior Court. It is within the constitutional power of the Legislature so to provide. I am therefore of the opinion that the proposed bill, if enacted, would be constitutional.

PUBLIC HEALTH — LICENSES — COLD STORAGE WAREHOUSE.

G. L., c. 94, § 66, providing that "no person shall maintain a cold storage or refrigerating warehouse without a license issued by the department of public health," requires a separate license for each plant operated.

Whether a group of buildings may fairly be considered to constitute but a single plant, and therefore to require but a single license, is a question of fact to be decided upon the concrete circumstances of each case.

To the Com-
missioner of
Public Health.
1923
May 31.

My opinion is requested relative to the licensing of cold storage warehouses under the provisions of G. L., c. 94, § 66.

The text of this act is as follows: —

No person shall maintain a cold storage or refrigerating warehouse without a license issued by the department of public health. Any person desiring such a license may make written application to such department, stating the situation of his plant. Upon receipt of the application the said department shall cause an examination of the sanitary condition of the plant to be made, and if it is found to be in a sanitary condition and otherwise properly equipped for the business of cold storage, said department upon receipt of a license fee of ten dollars shall cause a license to be issued authorizing the applicant to maintain therein a cold storage or refrigerating warehouse for one year. If any warehouse or any part thereof, licensed under this section, is deemed by said department to be conducted in an unsanitary manner, it shall close such warehouse or part thereof, until it has been put in sanitary condition, and said department may also suspend the license if the required changes are not made within a reasonable time. Each such licensee shall submit to the department of public health on or before the fifteenth day of each month, a

report on a printed form to be provided by said department, stating the quantities of articles of food placed in cold storage during the month preceding, and also the quantities of articles of food held on the first day of the month in which the report is filed or such other day as the commissioner of public health may from time to time fix.

The act does not provide specifically for a case where the same person maintains more than one cold storage warehouse. Under the statute, however, the licensee, in order to secure a license, must state in his application "the situation of his plant," in order that the department may then "cause an examination of the sanitary condition of the plant to be made." "If any warehouse or any part thereof, licensed under this section, is deemed by said department to be conducted in an unsanitary manner, it shall close such warehouse or part thereof, until it has been put in sanitary condition, . . ."

In my opinion, these provisions indicate that a separate license is required for each plant operated. Whether a group of buildings may fairly be considered to constitute a single plant, and therefor to require but a single license, is a question of fact, to be decided upon the concrete circumstances of each case. When all the buildings in question are operated from a single power plant, this fact would, in my opinion, be of importance in determining whether or not they may properly be looked upon as a single plant. It cannot be said, however, that the absence of this feature necessarily and as a matter of law would require a finding that the buildings were not fairly to be deemed a unit. The question is one of fact in each instance.

PRISONERS — MINIMUM AND MAXIMUM SENTENCES — PAROLE.

A sentence for a minimum and maximum term is in effect a sentence for the maximum term.

A prisoner in the Reformatory for Women, under a sentence of not less than five years and not more than eight years, is eligible for parole after serving three years and eleven months.

To the Com-
missioner of
Correction.
1923
June 1.

You have requested my opinion as to when a female prisoner is eligible for parole upon the following facts: A female was committed to the Reformatory for Women on two separate commitments, one upon a sentence of not less than five years and a day and not more than eight years, for larceny, and the other upon a sentence of two years, for forgery and uttering. The two sentences run concurrently.

I am of the opinion that she is not eligible for parole upon the sentence of two years, since at the time she is serving the longer sentence, upon which, under the present rules, she would not be eligible for parole at any time within the two-year period.

G. L., c. 279, § 18, provides: —

A female sentenced to the reformatory for women for larceny or any felony may be held therein for not more than five years, unless she is sentenced for a longer term, in which case she may be held therein for such longer term; . . .

A sentence for a minimum and maximum term is in effect a sentence for the maximum fixed by the court. *Commonwealth v. Brown*, 167 Mass. 144, 146; *Oliver v. Oliver*, 169 Mass. 592, 593; *Ex parte Spencer*, 228 U. S. 652, 661; *Adams v. Russell*, 229 U. S. 353, 362. In *Oliver v. Oliver*, *supra*, where the sentence was for not less than three nor more than six years, the court said, at page 594: —

The sentences must be deemed to be, for the purpose contemplated by this statute, either for the maximum or for the minimum term. They are indeterminate, and they cannot be treated as sentences for any intermediate term. In the interval between the two dates fixed is the convict

under sentence to imprisonment or not? He is all the time in the custody of the law under his sentence. He is in confinement at hard labor, unless for good reasons a permit to be at liberty on certain terms and conditions is given to him by the commissioners of prisons. If he obtains such a permit, it may be revoked at any time, and if any of its terms or conditions are broken it becomes *ipso facto* void. He is certainly under sentence during the whole of the maximum term. After the expiration of the minimum term the rigor of the sentence is mitigated by the law. If he obtains a permit, which is not revoked, and observes its terms and conditions, he is not confined at hard labor, but it seems more nearly correct to say that his sentence to confinement at hard labor is for the maximum term than to say that it is only for the minimum term.

G. L., c. 127, § 136, provides: —

If it appears to the board of parole that a prisoner in the reformatory for women . . . has reformed, it may grant her a permit to be at liberty during the remainder of the term for which she might be held therein.

Acting under this statute, the Board of Parole established Rule 10 for prisoners in the Reformatory, which provides: —

An inmate committed to the Reformatory upon a sentence of over five years shall have the right to make an application for a hearing on the question of his parole one month before he shall have served one-half of his sentence.

I am therefore of the opinion that the prisoner's sentence is eight years, and that under the present rule she may apply for a hearing on the question of parole after serving three years and eleven months.

I call your attention to G. L., c. 127, § 131, which provides that a prisoner in the State Prison may be paroled after he has served two-thirds of the minimum term, provided he has served at least two and one-half years. In the instant case, if the prisoner were a male, sentenced to the State Prison, he would be eligible for parole in three years and four months. Women cannot be sent to the State Prison, and it would seem that the intent of the Legislature was to make them subject to parole sooner than prisoners in the State

Prison. Under the existing rule, however, it may frequently happen that women must serve a proportionately longer period of time before being eligible for parole.

CIVIL SERVICE — VETERAN — SERVICE IN THE ARMY OR
NAVY OF THE UNITED STATES — DISCHARGE FROM
DRAFT.

A person is not a "veteran," within the meaning of G. L., c. 31, § 21, who was discharged from the draft at Camp Devens, on October 12, 1917, by reason of physical disability, such person having been inducted into the service from the jurisdiction of the local board for No. 21, Boston, on October 1, 1917.

Discharge from the draft is not the equivalent of an honorable discharge from service in the Army of the United States.

To the Com-
missioner of
Civil Service.
1923
June 11.

You request my opinion on the following question: Is a person a "veteran," within the meaning of G. L., c. 31, § 21, who was discharged from the draft at Camp Devens, on October 12, 1917, by reason of physical disability, said person having been inducted into the service from the jurisdiction of the local board for No. 21, Boston, on October 1, 1917?

G. L., c. 31, deals with the civil service. Section 21 thereof defines a "veteran" as follows: —

The word "veteran" as used in this chapter shall mean any person who has served in the army, navy or marine corps of the United States in time of war or insurrection and has been honorably discharged from such service or released from active duty therein, or who distinguished himself by gallant or heroic conduct while serving in the army or navy of the United States and has received a medal of honor from the president of the United States, provided that such person was a citizen of the commonwealth at the time of his induction into such service or has since acquired a settlement therein; and provided further that any such person who at the time of entering said service had declared his intention to become a subject or citizen of the United States and withdrew such intention under the provisions of the act of congress approved July ninth, nineteen hundred and eighteen, and any person designated as a conscientious objector upon his discharge, shall not be deemed a "veteran" within the meaning of this chapter.

The answer to your question turns upon what is meant by "service" in the Army, Navy or Marine Corps of the United States in time of war or insurrection, and "honorable discharge" therefrom; in other words, does the phrase "honorably discharged" mean an honorable discharge as that expression is commonly understood in military terms, or does it mean any discharge other than a dishonorable one?

The meaning of such expressions as "entering the service," "drafted into the service" or "actually mustered into the service" has been interpreted and decided in several cases immediately following the Civil War.

In the case of *French v. Sangerville* (1867), 55 Me. 69, the court said:—

It is contended that a drafted man is actually mustered into the military service as soon as drafted and notified of the fact. In a certain sense he is, undoubtedly, under martial law, so far that he may be treated as a deserter if he does not report himself to the provost marshal's office. But is he thereby actually mustered in, within the meaning of the statute? . . . When a drafted man reports himself, he must first be examined by the surgeon, as to his physical fitness. If found sound and able-bodied, he is then mustered actually into the military service. . . . Would it be seriously contended that a drafted man who had simply reported and been found unfit for the service, and had thereupon been released from all claim on him under the draft, had been actually mustered into the military service, and was therefore entitled to be paid, under this provision of the act of ratification? . . . The legislature certainly intended something beyond a mere drafting into service, or they would have simply said "all drafted men." . . . We are satisfied that the case before us is not within the clause of ratification, because the plaintiff has not shown that he was ever "actually mustered into the military service of the United States."

See also *Mahoney v. Lincolnville* (1868), 56 Me. 450.

In *Reed v. Sharon* (1868), 35 Conn. 191, it was held that one was not drafted into the service until he had had a physical examination and had been accepted by the board of enrollment; and that one was not so drafted merely because he was notified by the proper authorities that he had been drafted into the military service of the United States

and required to appear at a specified date for examination. See also *Gregg v. Jamison* (1867), 55 Pa. 468.

Under a statute authorizing a bounty to men, "drafted into the military service of the United States and serving therein," it was held that one was not entitled to a bounty who was drafted in February, 1865, reported to the deputy provost marshal, was examined and held to service, and then furloughed, and discharged in April, 1865, at the close of the war, without being mustered into service. See *Flynn v. Allen* (1865), 26 Phila. Leg. Int. 37.

In *Bickford v. Brooksville* (1867), 55 Me. 89, it was held that one was not entitled to a bounty, who, at the time he was drafted from the town, was working in the navy yard, reported to the provost marshal's office, where he was examined and accepted, was furloughed, returned to the navy yard and remained at work, and was finally discharged because the town's quota was filled by volunteers, such person not being a "drafted" man within the meaning of a vote of a town awarding \$350 "for each drafted man to fill our quota."

The proposition that one is not mustered into the military or naval service of the United States merely because he is drafted, reports pursuant to a notice to report at a certain rendezvous under pain of being deemed a deserter and subject to the penalty prescribed therefor by the rules and articles of war, is apparently well settled.

In construing the soldiers' bonus law this department has ruled that the provisions of Gen. St. 1919, c. 283, granting a war bonus to men honorably discharged from the service of the United States in the World War do not apply to drafted men who were passed by the draft board, sent to Army camps and there discharged because physically disqualified, or to men discharged on account of bad conduct or similar ground. See V Op. Atty. Gen. 405. In said opinion the following language was used: —

In my judgment, . . . it cannot be said that the class of men to which you refer was enlisted in or had been enrolled in or had been mustered into the Federal service, within the meaning of this statute. These men were never in the army of the United States to a sufficient extent to be discharged from it. In my opinion, it cannot be said that they performed "services . . . in the army . . . of the United States" of the character intended by this statute to be recognized. Accordingly, I must advise you that men of the class to which you refer are not entitled to the benefits of the statute.

So also this department has ruled that, in view of the express provision of Gen. St. 1919, c. 290, § 9, which incorporates into said section 9 the limitations prescribed by section 3 of said act, a man enrolled in the United States naval reserve force, who is called for active duty but who is almost immediately discharged for a disability not incurred in said service, is not entitled to military aid in the first, second, third or fourth classes defined by said section 9. See V Op. Atty. Gen. 471.

A former Attorney General has also ruled that the exemption from all poll taxes granted by Gen. St. 1919, c. 9, does not include persons who were summoned in the draft and reported for duty but were discharged before they were mustered into the Federal service. See V Op. Atty. Gen. 601.

A similar conclusion was reached by the Supreme Court of Rhode Island on substantially the same set of facts as those involved in the case under consideration. In the case of *Gilbert John Bannister v. Soldiers' Bonus Board*, 43 R. I. 346, decided February 11, 1921, the court held that a draftee who, in obedience to orders from the War Department, presented himself at the designated place for induction into the service, is not, where he is sent to a military camp and rejected from the draft ten days later because of physical disability, within the operation of a statute providing a bonus for each enlisted man "who is mustered into the Federal service and reports for active duty." In that case the court used the following language:—

We assume that the petitioner was passed by the local draft board, and, from the above order directing him to present himself at the State House, it would appear that he was inducted into the military service, but it was the intention of the Selective Service Law (U. S. Comp. Stat. §§ 2044a-2044k, 9 Fed. Stat. Anno., 2d ed., pp. 1136-1163) that each person inducted into the military service should be finally examined and accepted or discharged upon his arrival at the mobilization camp. Section 166 of the Selective Service Regulations prescribed by the President under the authority vested in him by the terms of the Selective Service Law provides that all men inducted into the service shall at the mobilization camp be finally accepted or rejected within fifteen days after the date of the registrant's induction into service. The petitioner was "inducted" into the military service, but he was not "mustered" into the service.

To entitle the petitioner to a bonus from the state he must have been recognized by the War or Navy Department as an enlisted man; he must have been "mustered into the Federal service" and he must have reported for active duty. The petitioner never had an opportunity to report for active duty. His experience with the draft never brought him to the stage where it was possible for the Army or Navy Department to order him to attack the enemy or endure other perils of war. He was not called for active duty. His name was selected by lot as were the names of all other persons who were called by the draft, and he, like the others, was ordered to report to a camp for final examination to determine his fitness for active duty. Had the petitioner successfully passed the physical examination, he probably would have been enrolled as a member of the Army and assigned to active duty in a training camp.

When the petitioner was drafted, or, in other words, inducted into the service, he became subject to military law and regulations. Section 6 of the Act of May 18, 1917, entitled "An Act to authorize the President to increase temporarily the military establishment of the United States," provides that any person who fails or neglects to perform any duty required of him in the execution of said act shall "if subject to military law . . . be tried by court-martial and suffer such punishment as a court-martial may direct." It was the intention of Congress, as expressed in the two acts last above cited, that a person should be subject to the military law during the time intervening between his induction into the service and his final acceptance or rejection. The purpose evidently was to prevent the government, in the emergency, from being hampered by the delays incident to procedure in the civil courts. A person, however, may be subject to military law and regulations without being a member

of the Army, and it does not follow that a man must be a member of the Army to be the subject of court-martial.

I am consequently of the opinion that the "discharge from draft" which was received by the person referred to in your inquiry is not the equivalent of an honorable discharge from service in the Army of the United States, and that the person is accordingly not a "veteran," within the meaning of G. L., c. 31, § 21.

PRISONERS — APPLICATION FOR PAROLE — HEARINGS.

A prisoner alone may apply for a permit to be at liberty.

Whether the Board of Parole will hear persons other than the prisoner, in his behalf, is a matter within its own discretion.

You have requested my opinion as to whether, under the provisions of G. L., c. 127, §§ 131 and 132, any person other than the prisoner may make application for a permit to be at liberty, and whether any person other than the prisoner may appear before the Board of Parole to speak in his behalf.

To the Board
of Parole.
1923
June 12.

G. L., c. 127, § 131, confers power upon the Board, under certain circumstances, to grant a special permit to be at liberty to a prisoner confined in the State Prison.

Section 132 provides: —

Any prisoner eligible for a release in accordance with the preceding section may apply for a permit to be at liberty as therein provided. The application shall be transmitted to the board of parole by the warden of the state prison or the superintendent of the Massachusetts reformatory, who shall send with it a report of the prisoner's conduct and industry, a statement concerning the prisoner's health, and any other information respecting the case which the warden or superintendent can supply; and *the board shall not entertain any other form of application or petition* for the release of a prisoner under the preceding section.

I am of the opinion that the *prisoner alone* may apply for a permit to be at liberty, and that an application from

any other source may not be entertained by the Board. There is nothing in the statute which prohibits the Board from permitting persons other than the prisoner to appear before it and speak in his behalf, *after* his application for a permit to be at liberty has been transmitted to the Board, in accordance with section 132. Whether the Board will hear such persons is within its own discretion.

SAVINGS BANKS — SAVINGS DEPARTMENTS OF TRUST COMPANIES — AUTHORIZED INVESTMENTS — CONSTRUCTION OF INDENTURE WITH RELATION TO BOND ISSUES.

Certain railroad bonds, the authorized issue of which, by the terms of the indenture, can never exceed, with all outstanding debts, three times the value of the capital stock, are a legal investment for savings banks and savings departments of trust companies.

To the Com-
missioner of
Banks.
1923
June 23.

You have requested my opinion as to whether the Louisville & Nashville Railroad Company first and refunding mortgage bonds, dated Aug. 1, 1921, are a legal investment for the saving banks and savings departments of trust companies of this Commonwealth, in view, more particularly, of the fact that an indenture, dated Nov. 21, 1922, supplemental to the said first and refunding mortgage, has been made by the Louisville & Nashville Railroad Company and the trustee named in the original mortgage.

For the purposes of your question, the savings departments of trust companies stand in the same position as savings banks, as it is provided by G. L., c. 172, § 61, that all investments of the savings departments of trust companies shall be made in accordance with the law governing the investment of deposits in savings banks.

Prior to 1908 all the railroads whose bonds were then authorized for investment of the character considered here were mentioned specifically in the statutes, with the exception of the general laws for the authorization of bonds of railroads incorporated in this State and in New England. A committee, consisting of the Bank Commissioner, the

Treasurer and Receiver General and the Commissioner of Corporations, made a report, with suggestions of changes in the General Laws of this State relating to savings banks. They completely redrafted the paragraph relating to railroad bonds in three divisions, all of which were entirely general in their terms, viz.: (1) Massachusetts railroads; (2) New England railroads; (3) other railroads. Referring to the third division, the committee said: —

In providing for the admission of the bonds of railroads operating in any of the United States we have felt it necessary to make much stricter requirements than in the case of railroads in New England, where railroad conditions are more established. Severe tests have, therefore, been provided for both the corporation and the bonds themselves.

The statutory provisions as enacted by the 1908 Legislature, based upon the aforesaid report, appear practically verbatim in the General Laws in force at this time.

G. L., c. 168, § 54, subdivision 3rd, (g) (3), authorizes the investment by savings banks in refunding mortgage bonds complying with certain conditions. Said section 54, subdivision 3rd, (e) (5), provides as follows: —

No bonds shall be made a legal investment by subdivision (g) in case the mortgage securing the same shall authorize a total issue of bonds which, together with all *outstanding prior debts* of the issuing or assuming corporation, including all bonds not issued that may legally be issued under any of its prior mortgages or of its assumed prior mortgages, after deducting therefrom, in case of a refunding mortgage, the bonds reserved under the provisions of said mortgage to retire prior lien debts at maturity, shall exceed three times the outstanding capital stock of said corporation at the date of such investment.

Section 1 of Article One of the Louisville & Nashville first and refunding mortgage provides as follows: —

The authorized issue of bonds under this indenture is limited so that the amount thereof at any one time outstanding, *together with all other then outstanding prior debt, as hereinafter defined*, of the Railroad Company, after deducting therefrom the amount of all bonds reserved under the

provisions of this indenture to retire prior debt at or before maturity, shall never exceed three times the par value of the then outstanding fully paid capital stock of the Railroad Company or of a successor corporation.

The second paragraph following defines "prior debt" as follows: —

In determining at any time and from time to time the limit of the authorized issue of bonds hereunder, the prior debt so to be added is that which at the time may remain unpaid on the principal of the bonds specified in Section 3 of Article Three of this indenture, and of the bonds which hereafter shall be included in prior debt under Sections 4 and 5 of said Article Three (but not including any of either class of said bonds deposited with and held by the Trustee as provided in Section 6 of said Article Three) and the "reserved bonds" to be deducted are the bonds, issuable under this indenture, which at that time are reserved for the purpose of refunding prior debt as provided in said Article Three. The term "prior debt," wherever used in this indenture, means the aggregate bonded indebtedness ascertained and determined in accordance with this paragraph of this Section 1 of Article One of this indenture.

The answer to your inquiry rests upon the interpretation of the words "outstanding prior debts" as found in the statute [G. L., c. 168, § 54, subdivision 3rd, (e) (5) and (6)]. Are these words to be construed to mean all pre-existing debts or debts prior in time, or do they mean prior lien debts; in other words, debts secured by a prior lien on the property covered?

The bonds specified in Section 3 of Article Three of the Louisville & Nashville first and refunding mortgage are bonds for the retirement of which bonds under the mortgage are reserved, amounting to \$176,260,500, being all, with the exception of one, underlying mortgage bonds secured by prior lien on the property covered by the refunding mortgage.

The present outstanding capital stock of the Louisville & Nashville Railroad being \$72,000,000, the authorized issue under the mortgage, under the interpretation that the words "prior debts" mean "prior lien debts," following the

method described in subdivision (e) (5) of the Massachusetts statute, would be: Authorized issue X, plus all outstanding prior debts (\$176,260,500), minus the bonds reserved to retire prior lien debts (\$176,260,500), equals three times the capital stock, or \$216,000,000. In other words, the total amount of bonds that may be issued under the mortgage is \$216,000,000. However, it is to be noted that in addition to the \$176,260,500 underlying bonds for which bonds are reserved under the mortgage in question, the Louisville & Nashville Railroad has outstanding the following issues of bonds:

\$3,500,000 Southeast & St. Louis Division first 6s, 1971.

3,000,000 Southeast & St. Louis Division second 3s, 1980.

These bonds are direct obligations of the Louisville & Nashville Railroad secured by mortgage on the property of the Southeast & St. Louis Railway, which is a separate corporation. As the property is not owned by the Louisville & Nashville Railroad, the mortgage in question does not cover the property, and therefore the railroad is not obliged to reserve bonds under the mortgage for their retirement. But if the words "prior debts," as found in our statute, are to be construed as meaning pre-existing debts or debts prior in time, these outstanding bonds would have to be considered in computing the authorized issue of the mortgage. Construing the words to mean pre-existing debts, the authorized issue would be as follows: Authorized issue X, plus all outstanding prior debts (\$176,260,500 plus \$3,500,000 Southeast & St. Louis Division first 6s, plus \$3,000,000 Southeast & St. Louis Division second 3s), minus bonds reserved to retire prior lien debts at maturity (\$176,260,500), equals three times the capital stock, or \$216,000,000. This amount is \$209,500,000, as follows: —

Authorized issue X	\$209,500,000
Plus prior debts	182,760,500
	<hr/>
	\$392,260,500
Minus amount reserved to retire prior lien debts	176,260,500
	<hr/>
	\$216,000,000

In my opinion, the Legislature intended that there should be a fixed relation of the total debts of a railroad corporation to its capital stock, and not merely the prior lien debts to the bonds in question; that the words "outstanding prior debts" mean all pre-existing debts of the railroad corporation; that, in the given case, this interpretation requires that the outstanding issue of the Southeast & St. Louis Division railroad bonds, totaling \$6,500,000, are to be included in the debts in computing the amount of bonds authorized by the terms of the mortgage. Following this interpretation, the Louisville & Nashville Railroad Company mortgage authorizes \$6,500,000 of bonds in excess of the limit set down by subdivision (e) (5) and (6).

In view of the foregoing considerations, I am of the opinion that the bonds in question were not legal investments for the savings banks nor for the savings departments of trust companies of this Commonwealth under the terms of the first and refunding mortgage as originally drawn. However, the indenture made on Nov. 1, 1922, already referred to, completely changes the situation. In this supplemental indenture an attempt has been made by the Louisville & Nashville Railroad to cure the defect in the position of its bonds by modifying the terms of the first mortgage so that the words "prior debts," used in said mortgage, shall be interpreted in their natural significance as "antecedent debts," and not as defined in section 1 of article one (p. 58) of the first mortgage itself, so as to mean only debts "superior" to others because secured by a lien on the property of the

railroad, and in this attempt the railroad appears to have been successful.

The supplemental indenture appears to have been properly issued, for, under the provisions of article eleven of the first mortgage, the railroad company, when authorized by its board of directors and the trustee under such mortgage, had the authority to enter into a supplemental indenture which shall thereafter form part of the original indenture and which may deal with almost any portion of the indenture itself.

(a) To convey, transfer and assign to the Trustee and to subject to the lien of this indenture, with the same force and effect as though included in the granting clause hereof, additional railroads or leases thereof, bonds, shares of capital stock, equipment and any other property then owned by the Railroad Company, acquired by it through consolidation or merger or by purchase, or otherwise. The prior debt secured by mortgage to which any lines of railroad so conveyed shall be subject, shall be specified and described and the amount thereof stated in such supplemental indenture; and the prior debt so specified and described shall thereupon and thereafter be deemed and taken to be included in Section 4 of Article Three hereof.

(b) To specify and state the bonded indebtedness, and the amount thereof, of any company which hereafter shall be consolidated with or merged into, or whose railroad property hereafter shall be acquired by, the Railroad Company, although such bonded indebtedness may not be secured by mortgage, which bonded indebtedness is to be regarded as forming a part of the prior debt of the Railroad Company, and to retire which, at or before maturity, bonds are to be reserved as provided in Section 5 of Article Three hereof.

(c) To evidence the succession of another corporation to the Railroad Company, or successive successions, and the assumption by a successor corporation of the covenants and obligations of the Railroad Company under this indenture.

(d) To make provision for the appointment of a co-trustee as hereinafter provided for in Section 6 of Article Twelve of this indenture.

(e) To make such provision as may be necessary or desirable with respect to any series of bonds, if any, issued under this indenture, convertible into shares of the capital stock of the Railroad Company.

(f) To provide for the creation and maintenance of a sinking fund for the redemption before maturity, or the payment, of all or any part of any series of bonds issued hereunder, and to constitute a default in respect

of such sinking fund an event of default with the same force and effect as if the same had been so denominated in Section 2 of Article Seven hereof.

(g) To add to the limitations on the authorized amount, issue and purposes of issue of bonds issuable under Section 7 of Article Three of this indenture, other than the limitations herein provided for.

(h) To make provision in regard to matters or questions arising under this indenture as may be necessary or desirable and not inconsistent with this indenture. (P. 156, first mortgage.)

These provisions are certainly broad enough to permit the supplemental indenture to deal with the limitation of the amount of bonds which may be issued.

The supplemental indenture so made is of interest only because it modifies the first mortgage by altering the definition of the words "prior debts" as it was contained in the first draft, so that the words are specifically said to include every outstanding prior debt, whether a prior debt as defined by the first mortgage or not. It further stipulates that the authorized total issue of bonds "shall at all times be limited to an amount, which, together with all outstanding prior debts (including every outstanding prior debt, whether or not included within the definition of prior debt contained in this Indenture) . . . shall never at any time exceed three times the then outstanding capital stock of the Railroad Company. All certificates delivered to the Trustee by the Railroad Company, upon requisitions for the certification of bonds, shall, in addition to the other statements therein required to be contained by this Indenture, contain a statement of the amount of all outstanding prior debts, of the Railroad Company in this section 1a referred to after deducting therefrom the bonds reserved under the provisions of this Indenture to retire prior debts at maturity; such statements shall constitute sufficient evidence to the Trustee, as to the facts therein stated, and the Trustee shall be fully protected in acting upon the faith thereof." (Article one, section 1, supplemental indenture.)

This change by the supplemental indenture, defining the words "prior debts," the source of the adverse view of the bonds for savings bank investment, to a definition so inclusive as to cover the bonds of the Louisville & Nashville Southern 4% (first indenture, p. 72), clears away the existing difficulty. The authorized outstanding issue under the new provisions can never exceed, with all outstanding debts, three times the value of the capital stock. This places these bonds in a position where they will be a legal investment for savings banks and savings departments of trust companies as soon as they have been properly executed.

WRENTHAM STATE SCHOOL — ADMISSION AND DISCHARGE OF PUPILS OR OTHER INMATES.

- The Trustees of the Wrentham State School are not authorized to receive those who themselves ask admission.
- The trustees are authorized to receive those for whom application is made by parent or guardian.
- Such parent or guardian has no right to take away such person from the school without the consent of the trustees, except upon application to the court.
- If in the opinion of the trustees inmates over the school age will receive benefit from school instruction, the trustees are authorized to place such inmates in the school department.
- A minor placed in the school by his parent or guardian may be discharged after reaching his majority only in the discretion of the trustees or upon application to the court.
- A minor committed to the school may be held in the custody of the school after reaching his majority without a recommitment.

My opinion is requested on certain questions relative to the duties of the board of trustees of the Wrentham State School.

I understand the first question presented is as follows: Are the trustees of the Wrentham State School authorized to receive in the institution persons who themselves ask admission?

G. L., c. 123, § 66, provides for commitment to the school by a judge of probate. Sections 46 and 47 of said chapter are as follows:—

To the Com-
missioner of
Mental
Diseases,
1923
June 27.

SECTION 46. Persons received by the Massachusetts school for the feeble-minded and by the Wrentham state school shall be classified in said departments as the trustees shall see fit, and the trustees may receive and discharge pupils, and may at any time discharge any pupil or other inmate and cause him to be removed to his home.

SECTION 47. The trustees of either of the state schools mentioned in the two preceding sections may, at their discretion, receive any feeble-minded person from any part of the commonwealth upon application being made therefor by the parent or guardian of such person, which application shall be accompanied by the certificate of a physician, qualified as provided in section fifty-three that such person is deficient in mental ability, and that in the opinion of the physician he is a fit subject for said school. The physician who makes the said certificate shall have examined the alleged feeble-minded person within five days of his signing and making oath to the certificate. The trustees of either of said state schools may also, at their discretion, receive any person from any part of the commonwealth upon the written request of his parent or legal guardian, and may detain him for observation for a period not exceeding thirty days, to determine whether he is feeble-minded.

The statute makes no provision for admission of those who themselves ask admission. I am of the opinion that the trustees are authorized to receive only those persons who have been committed by the Probate Court or those who have been placed there upon application by the parent or guardian.

The second question I understand to be as follows: Are the trustees authorized to receive those for whom application is made by parent or guardian?

Section 47 of said chapter 123 expressly provides for such admission upon compliance with the requirements therein set forth.

The third question presented is as follows: Can those who have been placed in the school upon application by a parent or guardian be taken from the school at any time the parent or guardian sees fit?

St. 1909, c. 504, codified the law relative to insane persons. Section 62 thereof (now, in substance, G. L., c. 123, § 46) provided: —

Persons received by the Massachusetts School for the Feeble-Minded and by the Wrentham state school shall from time to time be classified in said departments as the trustees shall see fit, and the trustees may receive and discharge pupils at their discretion, and may at any time discharge any pupil or other inmate and cause him to be removed to his home or to the place of his settlement.

There is no other provision in the statute for their release except upon application to the court. This clearly shows that the release of such persons, subject to the foregoing exception, is entirely within the discretion of the board of trustees.

It is to be noted that under section 62 of said chapter 504 the trustees were authorized to receive pupils. This statute did not authorize the trustees to receive persons into the custodial department. Gen. St. 1917, c. 223, § 2, however, enlarged the right of the trustees so as to receive persons into the custodial department. The power of the trustees to discharge is the same whether the inmate is in the school or in the custodial department. I therefore advise you that, in my opinion, the parent or guardian has no right to take away such person from the school without the consent of the trustees.

Your fourth question is as follows: Have the trustees the right to expend the money of the Commonwealth in giving instruction in the school department to persons over the school age?

G. L., c. 123, § 45, reads as follows: —

The Massachusetts school for the feeble-minded and the Wrentham state school shall each maintain a school department for the instruction and education of feeble-minded persons who are within the school age or who in the judgment of the trustees thereof are capable of being benefited by school instruction, and a custodial department for the care and custody of feeble-minded persons beyond the school age or not capable of being benefited by school instruction.

It is clear from this section that it is discretionary with the trustees whether or not a person over the school age

shall be placed in the school department. If, in the opinion of the board of trustees, such person will receive benefit from school instruction, they are authorized to place such person in the school department, irrespective of age.

Your fifth question is as follows: May any person who, while a minor, was placed in the institution by his parent or guardian be retained in the school against his will after reaching the age of twenty-one?

This question falls under G. L., c. 123, § 46, and such a person may be discharged from the school only in the discretion of the board of trustees, except, of course, that such a person or his parent or guardian may apply to the court for discharge.

Your sixth question is as follows: Can a person who was committed to the school while a minor be held in the custody of the school after reaching the age of twenty-one, without a recommitment?

G. L., c. 123, § 66, provides for commitment, and authorizes custody of the person until he shall be discharged by order of the court or otherwise in accordance with law. Without a court order such person may be held by the school until such time as, in the opinion of the trustees, he should be discharged. The fact that he arrives at the age of majority in no way concerns this question.

NATIONAL GUARD — PRACTISING RIFLE OR PISTOL SHOOTING ON RIFLE RANGES ON SUNDAYS.

The discharge of firearms on Sunday for sport or in the pursuit of game is prohibited. Members of the National Guard may legally practise rifle or pistol shooting on a rifle or pistol range on Sundays, in the course of their military training.

To the Adjutant General.
1923
June 28.

You request my opinion as to whether it is legal for members of the National Guard to practise rifle or pistol shooting on any rifle or pistol range within the Commonwealth on Sundays. You state that this practise constitutes an important part of their military training, and that,

owing to the limited amount of time at the disposal of the members of the National Guard, it is desired that this duty shall be performed on Sundays.

G. L., c. 136, § 17, provides, in part:—

Whoever on the Lord's day discharges any firearm for sport or in the pursuit of game, . . . shall be punished by a fine of not more than ten dollars. . . .

The discharge of firearms *for sport or in the pursuit of game* is thereby prohibited. The discharge of firearms by members of the National Guard, under the circumstances to which you refer, is not a discharge for sport or in the pursuit of game. Rifle and pistol practice is in the line of military duty and, as you state, is an important part of the military training.

I am of the opinion that members of the National Guard may legally practise rifle and pistol shooting on a rifle or pistol range within the Commonwealth on Sundays in the course of their military training.

STANDARD BOX FOR FARM PRODUCE — REQUIREMENTS AS TO MARKING BOXES — USE OF RISERS IN PACKING APPLES.

An apple grower who uses boxes which are standard according to St. 1921, c. 248, must mark said boxes, if they contain apples, in accordance with the requirements of both said chapter 248 and G. L., c. 94, § 104.

The dimensions of the standard box for farm produce sold at wholesale, as defined in St. 1921, c. 248, are not affected by the fact that in some instances, where such box is used for the packing of apples, risers, so called, about five eighths of an inch thick, are placed on the ends of the box; if the box contains the dimensions required by statute it constitutes a standard box.

You request my opinion as to whether an apple grower who uses boxes which are standard according to St. 1921, c. 248, is obliged to mark such boxes both in accordance with the apple grading law and in accordance with the standard box law. You also request my opinion as to

To the Commissioner of
Agriculture.
1923
June 28.

whether a box of the same dimensions as the standard box is to be considered standard if the ends are built higher than the sides, or if risers are added to the ends, in order properly to pack apples so as to fill the standard box even full and permit covering, or whether in either or both cases the boxes are not to be considered standard, and thus not subject to marking as prescribed in chapter 248, *supra*.

St. 1921, c. 248, § 1, provides as follows: —

. . . The Massachusetts standard box for farm produce sold at wholesale, except as otherwise provided, shall contain two thousand one hundred fifty and forty-two one hundredths cubic inches and shall be of the following dimensions by inside measurements: seventeen and one half inches in length by seventeen and one half inches in width and seven and one sixteenth inches in depth. The Massachusetts standard half box for farm produce sold at wholesale shall contain one thousand seventy-five and twenty-one one hundredths cubic inches and shall be of the following dimensions by inside measurements: twelve and three eighths inches in length by twelve and three eighths inches in width and seven and one sixteenth inches in depth. When the above specified boxes are made of wood the ends shall be not less than five eighths inches in thickness and the sides and bottom not less than three eighths inches in thickness. All such boxes and half boxes of the dimensions specified herein shall be marked on at least one outer side in bold, uncondensed capital letters, not less than one inch in height: — Standard Box Farm Produce, — and, — Standard Half Box Farm Produce, — respectively. Whoever marks or otherwise represents any box or half box to be a standard box or half box for the sale of farm produce at wholesale shall, unless such box or half box complies with every specification and requirement of this section, be punished by a fine of not more than fifty dollars. The director of standards in the department of labor and industries, his inspectors and the sealers and deputy sealers of weights and measures in cities and towns shall enforce the provisions of this section.

G. L., c. 94, § 104, provides as follows: —

Each closed package of apples packed or repacked within the commonwealth and intended for sale within or without the commonwealth, shall have marked in a conspicuous place on the outside of the package in plain letters a statement of the quantity of the contents, the name and address of the person by whose authority the apples were packed, the true name of the variety, and the grade and minimum size of the apples contained

therein, in accordance with sections one hundred and one and one hundred and three, and the name of the state where they were grown. If the true name of the variety is not known to the packer or other person by whose authority the apples are packed, the statement shall include the words "variety unknown," and if the name of the state where the apples were grown is not known, this fact shall also be set forth in the statement. If apples are repacked, the package shall be marked "repacked," and shall bear the name and address of the person by whose authority it is repacked, in place of that of the person by whose authority they were originally packed.

This section pertains to packages containing apples, while St. 1921, c. 248, pertains to "standard for boxes and half boxes for farm produce sold at wholesale." Each statute contains a mandatory requirement as to marking on the outside of the package or box. I am accordingly of the opinion that an apple grower who uses boxes which are standard according to St. 1921, c. 248, must mark said boxes, if they contain apples, in accordance with the requirements of both said chapter 248 and G. L., c. 94, §104.

The dimensions of the standard box for farm produce sold at wholesale, as defined in St. 1921, c. 248, are not, in my opinion, affected by the fact that in certain instances, where said box is used for the packing of apples, risers, so called, about five-eighths of an inch thick, are placed on the ends of the box, inasmuch as it appears that most varieties of apples will not pack in such a way as to fill the standard box even full but will over-run somewhat so that they cannot be covered unless the sides or ends of the box are increased in height. The purpose of the risers is obviously merely to permit the box to be suitably covered, and if the box contains the dimensions provided for in said act I am of the opinion that it constitutes a standard box, as therein defined, although in the cases referred to it is necessary to attach such risers.

INSURANCE — POLICIES TO TOBACCO GROWERS FOR DAMAGE
BY HAIL — DIFFERENCE IN COST OF POLICIES TO DIFFERENT
PERSONS, BASED ON MEMBERSHIP OR NON-MEMBERSHIP IN AN
ASSOCIATION OF TOBACCO GROWERS — REBATES.

G. L., c. 175, § 182, prohibits the giving by an insurance company of a lower rate to certain insureds merely because the favored insureds are members of a particular association.

There may be an allowable difference in rates for policies to tobacco growers, if it is based upon a reasonable mode of classifying the insureds.

To the Com-
missioner of
Insurance.
1923
June 30.

You ask me for an opinion as to whether or not the course followed by an insurance company in issuing policies to tobacco growers generally, for damage by hail, at a regular rate of \$50 an acre, while at the same time it sells policies of a similar character to members of an association of tobacco growers, and to them only, at a rate of \$24, is, under all the circumstances, a violation of G. L., c. 175, § 182, which forbids the giving of rebates and other advantages to certain customers.

As I understand the letter given to you by the vice-president of the insurance company in answer to a letter written by a tobacco grower (hereinafter called the "complainant"), the insurance company does give, if desired, to some 2,000 members of the tobacco association insurance against loss by hail, at the rate of \$24 an acre, but will not sell at this price to non-members, of whom the complainant is one. The insurance company contends that this lower rate given to these particular persons, is not in the nature of a rebate or other advantage forbidden by the statute, because the members of this association agree to write eighty per cent of their insurance with this particular insurance company; that much of this tobacco so offered for insurance is in other and more desirable localities than that of the complainant, and so more desirable as a risk to the company; and that also the members of the association agree to write their fire insurance on their tobacco, as well as their hail insurance,

with this insurance company, which the complainant does not do.

The statute under consideration is as follows (G. L., c. 175, § 182):—

No company, no officer or agent thereof and no insurance broker shall pay or allow, or offer to pay or allow, in connection with placing or negotiating any policy of insurance or any annuity or pure endowment contract or the continuance or renewal thereof, any valuable consideration or inducement not specified in the policy or contract, or any special favor or advantage in the dividends or other benefits to accrue thereon; or shall give, sell, or purchase, or offer to give, sell or purchase, anything of value whatsoever not specified in the policy; or shall give, sell, negotiate, deliver, issue, or authorize to issue or offer to give, sell, negotiate, deliver, issue, or authorize to issue any policy of workmen's compensation insurance at a rate less than that approved by the commissioner. No such company, officer, agent or broker shall at any time pay or allow, or offer to pay or allow, any rebate of any premium paid or payable on any policy of insurance or any annuity or pure endowment contract.

The statute is aimed to prevent discrimination between individuals of the same class. To favor one particular member of a class merely because he buys more insurance or more kinds of insurance than another is prohibited by the statute. V Op. Atty. Gen. 543.

Nevertheless, there is no doubt but that there may be made a reasonable classification among insurers of the same kind of property, based not upon volume of business but upon quality; that is, upon a less hazardous undertaking. It may be that, under the arrangement made between the company and the association referred to, a class of insureds different from the one to which the complainant belongs may reasonably be said to exist. The fact that the properties of this latter class are in widely scattered localities, and in widely separated areas, where the average hazard will not be as great as in the district in which alone the assured desires property insured, may be, if the facts justify it, a reasonable mode of classification which would give no undue advantage to one assured over another, within the

meaning of the statutes. Whether all the facts necessary to be ascertained relative to the business of tobacco growing make such a form of classification reasonable, is itself a question of fact, upon which it is not my province to pass. The mere fact that the members of the association of growers offered a larger volume of business than that offered by the complainant, would not, in itself, furnish a reasonable ground for placing them in a different classification as to rates. The mere fact that they were members of an association, as such, would not make their classification reasonable. The mere fact that they offered to place fire insurance as well as hail insurance, would not make the classification reasonable. But if the facts in this particular trade, relative to variation in the grade of tobacco grown in various localities, show that the tobacco offered by members of this association, by reason of the variety of the places of growth, tends to make the offerings, on the whole, much less hazardous risks, than the risk offered by the complainant's tobacco from a single and possibly unfavorable locality, then it is possible that, as I have said, as a matter of fact a classification of insureds, such as was practised by this insurance company, might not be unreasonable.

TAXATION — FOREIGN CORPORATIONS — ALLOCATION OF INCOME.

Under Gen. St. 1919, c. 355, §§ 19 and 20 (G. L., c. 63, §§ 41 and 42), a foreign corporation must give notice in each year of its refusal to accept determination of income allocable to the Commonwealth by the statutory method provided by section 19, as a basis of its right to have its net income derived from business carried on within the Commonwealth determined by the alternative method provided by section 20.

To the Board
of Appeal in
Tax Cases.,
1923
July 3.

You have requested my opinion in the matter of an excise tax assessed upon the Childs Dining Hall Company for the year 1921. The following facts appear from the statement contained in your request.

The Childs Dining Hall Company is a foreign corporation

doing business in this Commonwealth and in other States. Under date of April 8, 1920, in accordance with the statutory provisions contained in Gen. St. 1919, c. 355, §§ 19 and 20 (G. L., c. 63, §§ 41 and 42), the company notified the Commissioner of its refusal to accept the determination of its net income derived from business carried on within the Commonwealth in the manner provided by section 19, and thereafter filed its return for the year 1920 with its own allocating method attached thereto. The Commissioner assessed a tax for the year 1920 on the basis of the allocating method set out in the statute, and the company appealed to the Board of Appeal, which subsequently revised the determination of the Commissioner.

While the application for a hearing by the Board of Appeal was pending and before the hearing, the time arrived for the filing of the 1921 return. The corporation filed its return for that year on or about May 11, 1921, with a statement of reasons for late filing and with the same allocating method as in 1920. No refusal to accept the statutory method was filed with respect to the return for 1921, unless the notification of April 8, 1920, constituted such notification or unless such notification may be inferred from the pending proceedings relative to the 1920 tax.

The Commissioner determined the 1921 tax by the method provided by G. L., c. 63, § 41. The company paid the tax under protest, and after numerous hearings the Commissioner refused to abate the tax and the company appealed again to the Board of Appeal. You ask whether the Board of Appeal can act favorably upon the appeal.

G. L., c. 63, §§ 41 and 42, are as follows: —

SECTION 41. The Commissioner shall determine in the manner provided in this section the part of the net income of a foreign corporation derived from business carried on within the commonwealth.

The following classes of income shall be allocated as follows:

(a) Gains realized from the sale of capital assets, if such assets consist of real estate or tangible personal property situated in the commonwealth, shall be allocated to this commonwealth.

(b) Interest received from any corporation organized under the laws of the commonwealth or from any association, partnership or trust having transferable shares and having its principal place of business in the commonwealth, or from any inhabitant of the commonwealth, except interest received on deposits in trust companies or in national banks doing business in the commonwealth, shall be allocated to this commonwealth.

(c) Gains realized from the sale of capital assets other than those named in paragraph (a) above shall not be allocated in any part to this commonwealth.

Income of the foregoing classes having thus been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:

If a foreign business corporation carries on no business outside this commonwealth, the whole of said remainder shall be allocated to this commonwealth.

If a foreign business corporation carries on any business outside this commonwealth, the net income taxable under this chapter shall be determined as provided in section thirty-eight.

SECTION 42. A foreign corporation carrying on part of its business outside the commonwealth may, in lieu of the allocating method required by the preceding section for determining the amount of business assignable to this commonwealth, refuse to accept such determination by notification thereof to the commissioner on or before the time when its income tax return under this chapter is due to be filed. Such a foreign corporation shall, within thirty days thereafter, file with the commissioner, under oath of its treasurer, a statement in such detail as the commissioner shall require, showing the amount of its annual net income derived from business carried on within the commonwealth. The commissioner may require such further information with reference thereto as he may deem necessary for the assessment of the tax, and shall determine the proportion of the net income received from business carried on within the commonwealth.

It is my opinion that G. L., c. 63, § 42, and the corresponding provision of the statute of 1919 require definite action each year by a foreign corporation which desires to refuse to accept a determination of net income derived from business carried on within the Commonwealth according to the statutory method provided by the preceding section, by a notification each year to the Commissioner of the refusal of the corporation to accept such determination;

and that such notification is not to be inferred from the giving of a similar notice for a preceding year or from proceedings had in consequence of such prior notice. The reference in section 42 to "the time when its income tax return under this chapter is due to be filed" and the requirement that the corporation "shall, within thirty days thereafter, file with the commissioner" the required statement, seem to me to preclude any other construction. I must advise you, therefore, that under the circumstances the determination made by the Commissioner seems to have been the only one legally permissible, and that the amount of the tax resulting therefrom seems to be fixed as a matter of law.

TEACHERS' RETIREMENT ASSOCIATION — WITHDRAWAL OF MEMBERSHIP — REFUND — RETIRING ALLOWANCE.

- A teacher who has not attained the age of sixty may withdraw from the public school service under the provisions of G. L., c. 32, § 11, and is entitled to receive from the annuity fund all amounts contributed as assessments, together with regular interest thereon; and having so withdrawn and received said refund, such teacher has thereby withdrawn entirely from the public school service.
- G. L., c. 32, § 10, par. (2), provides for a mandatory retirement from service in the public schools by any member of the association on attaining the age of seventy years, and § 10, par. (1), permits a teacher between the ages of sixty and seventy to apply for retirement; and on retirement such a teacher has withdrawn from the public school service.
- A voluntary member of the Teachers' Retirement Association sixty years of age or over, who has terminated his service as a teacher in the public schools, is not entitled to receive a refund of his contributions, but must accept the retiring allowance provided by the statute.
- The phrase "any member," as used in G. L., c. 32, § 10, applies to voluntary members, i.e., teachers who entered the service of the public schools before July 1, 1914, and who have elected to become members of the association, as well as to teachers who entered the service of the public schools for the first time after July 1, 1914, and thereby *ipso facto* became members of the association by virtue of the provisions of section 7.

You request my opinion on the following questions: —

1. Can a teacher who voluntarily joined the Massachusetts Teachers' Retirement Association withdraw from membership in the Association, receiving a refund of his contributions with interest, without with-

To the Commissioner of
Education.
1923
July 16.

drawing from the public school service — (a) If he has not attained the age of sixty? (b) If he is sixty years of age or over?

2. Can a voluntary member sixty years of age or over who has terminated his service as a teacher in the public schools withdraw from membership in the Retirement Association, receiving a refund of his contributions with interest, or must he, either at the time he terminates his service or at some time thereafter, accept a retiring allowance?

3. Can a teacher who entered the service of the public schools of Massachusetts for the first time after July 1, 1914, thereby being required to join the Retirement Association, receive a refund of his contributions with interest upon terminating his service in the public schools after he has attained the age of sixty, or must he, either at the time he terminates his service or at some time thereafter, accept a retiring allowance?

1. G. L., c. 32, §§ 6-19, pertain to retirement system for teachers. Section 7 thereof provides as follows: —

There shall be a teachers' retirement association organized as follows:

(1) All persons now members of the teachers' retirement association established on July first, nineteen hundred and fourteen, shall be members thereof.

(2) All teachers hereafter entering the service of the public schools for the first time shall thereby become members of the association.

(3) Any teacher who entered the service of the public schools before July first, nineteen hundred and fourteen, who has not become a member of the association, may hereafter, before attaining the age of seventy, upon written application to the board, become a member of the association by paying an amount equal to the total assessments, together with regular interest thereon, which he would have paid if he had joined the association on September thirtieth, nineteen hundred and fourteen.

(4) Teachers in training schools maintained and controlled by the department of education shall be considered as public school teachers under sections seven to nineteen, inclusive, and such a teacher upon becoming a member of the association shall thereafter pay assessments based upon his total salary including the part paid by the commonwealth; provided, that the total assessments shall not exceed one hundred dollars in any year. Such assessments shall be deducted in accordance with the rules prescribed by the board. This paragraph shall not apply to teachers regularly employed in the normal schools and therefore subject to sections one to five, inclusive, although they devote a part of their time to training school work.

Section 10 provides, in part: —

(1) Any member of the association shall, on written application to the board, be retired from service in the public schools on attaining the age of sixty, or at any time thereafter. . . .

(2) Any member, on attaining the age of seventy, shall be retired from service in the public schools at the end of the school year in which said age is attained, but any member attaining that age in July, August or September shall then be retired.

The provision authorizing withdrawal and reinstatement of members of the public school service is contained in section 11 as follows:—

(1) Any member withdrawing from the public school service before becoming eligible to retirement, except for the purpose of entering the service of the commonwealth, and any member who becomes subject to chapter two hundred and thirty-seven of the acts of nineteen hundred and chapter five hundred and eighty-nine of the acts of nineteen hundred and eight as amended shall be entitled to receive from the annuity fund all amounts contributed as assessments, together with regular interest thereon, either in one sum or, at the election of the board in four quarterly payments. If a member dies before receiving all his quarterly payments the balance thereof shall be paid to his estate.

(2) Any member thus withdrawing, after having paid ten annual assessments, may receive, at his election and in lieu of payments under paragraph (1) of this section, an annuity for life, as determined by the board, of such amount as the sum of his assessments under section nine, paragraph (2), with regular interest thereon, shall entitle him to receive, with the provision that if he dies before receiving payments equal to the amount used to purchase the annuity the difference shall be paid to his estate.

(3) Any member after having withdrawn from the public school service shall, on being re-employed in such service, be reinstated as a member in accordance with such rules for reinstatement as the board shall adopt.

(4) If a member who is not receiving payments under paragraph (1) or (2) of this section dies before retirement, the full amount of his assessments, with regular interest thereon, shall be paid to his estate.

Under the statute a teacher who entered the service of the public schools before July 1, 1914, has an option whether to become a member of the Teachers' Retirement Association or not, whereas all teachers entering the service of the public schools for the first time after July 1, 1914, "shall thereby

become members of the association." Inasmuch as your first question relates to a teacher who "voluntarily" joined the Massachusetts Teachers' Retirement Association, it is clear that such a teacher must have entered the service of the public schools before July 1, 1914.

Leaving out of present consideration the case of a teacher who has become permanently incapable of rendering satisfactory service by reason of physical or mental disability and is accordingly retired, as provided in section 10, paragraph (8), it is clear that a teacher who has not attained the age of sixty, and consequently has not become eligible to retirement, may withdraw from the public school service under the provisions of section 11, and if he does so he is entitled to receive from the annuity fund all amounts contributed as assessments, together with regular interest thereon, either in one sum or, at the election of the board, in four quarterly payments. Having so withdrawn and received his proper refund, I am of the opinion that such teacher has thereby *ipso facto* withdrawn entirely from the public school service. Any other conclusion would be inconsistent with the purpose and effect of the statute.

G. L., c. 32, § 10, par. (2), provides for a mandatory retirement from service in the public schools by any member of the association on attaining the age of seventy. Said section also provides, in paragraph (1), that any member of the association on attaining the age of sixty "shall, on written application to the board, be retired . . ." The context discloses that between the ages of sixty and seventy a teacher may apply for retirement. If a teacher, on attaining the age of sixty, does not file a written application for retirement to the Teachers' Retirement Board, he is apparently entitled to continue in service, unless in the opinion of the employing school committee he is incapable of rendering satisfactory service as a teacher, in which event he may, with the approval of said board, be retired by such committee or employer. The same reasons appear to follow in the case of such a teacher who has attained the age of

sixty years as in the case of one who has not attained said age, and I am accordingly of the opinion that such a teacher on retirement has withdrawn from the public school service.

2. G. L., c. 32, § 10, par. (5), provides as follows: —

Any member who served as a regular teacher in the public schools prior to July first, nineteen hundred and fourteen, and who has served fifteen years or more in the public schools, not less than five of which shall immediately precede retirement, on retiring as provided in paragraph (1) or (2) of this section, shall be entitled to receive a retirement allowance as follows: (a) such annuity and pension as may be due under paragraphs (3) and (4) of this section; (b) an additional pension to such an amount that the sum of this additional pension and the pension provided in paragraph (4) of this section shall equal the pension to which he would have been entitled under sections seven to nineteen, inclusive, if he had paid thirty assessments based on his average yearly rate of salary for the five years immediately preceding his retirement, at the rate of assessment in effect at that time, and his account had been annually credited with interest at the rate of four per cent per annum; provided, that if his term of service in the commonwealth shall have been over thirty years, the thirty assessments, with interest as provided above, shall be credited with interest at the rate of four per cent, compounded annually for each year of service in excess of thirty; but the assumed accumulation of assessments with interest under this paragraph shall not exceed the amount which at the age of sixty and in accordance with clause (a) of paragraph (3) of this section will purchase an annuity of five hundred dollars, and the minimum pension shall be of such an amount that the annual pension, plus the annual amount which would have been paid from the annuity fund if the member had chosen an annuity computed under clause (3) (a) of this section, shall be four hundred dollars. If a member is at any time eligible to retire and receive a pension computed under this paragraph, he shall receive upon retirement a pension computed hereunder without the necessity of five years of continuous service preceding retirement.

In an opinion rendered by a former Attorney General to the Board of Retirement, (V Op. Atty. Gen. 192), it was decided that under the statutes governing the retirement system for employees of the Commonwealth any member of the Retirement Association who ceases to be an employee after he has acquired voluntary retirement rights is not entitled to a refund of his payments, the only course open

to him upon leaving the service being to exercise his retirement rights and to accept a pension.

The statute under consideration contains no provision authorizing a refund of contributions with interest under the facts stated in your second question, and I am accordingly of the opinion that such a voluntary member, sixty years of age or over, who has terminated his service as a teacher in the public schools is not entitled to receive a refund of his contributions but must accept the retiring allowance provided by the statute.

3. G. L., c. 32, § 10, provides that "any member" of the association may, on written application to the Teachers' Retirement Board, be retired on attaining the age of sixty. This accordingly applies to voluntary members, that is, teachers who entered the service of the public schools before July 1, 1914, and who have elected to become members of the association, as well as to teachers who entered the service of the public schools for the first time after July 1, 1914, and thereby *ipso facto* became members of the association by virtue of section 7. Therefore, the same conclusion reached in my answer to your second question applies to your third question, and I am accordingly of the opinion that such a teacher is not entitled to receive a refund of his contributions with interest, but he must accept the retiring allowance provided by said section 10.

SOLDIERS' RELIEF — DEPENDENTS — RE-ENLISTMENT IN
TIME OF PEACE — VETERAN — HONORABLE DISCHARGE
— EFFECT OF DISHONORABLE DISCHARGE.

The dependents of a person who served honorably in the war with Spain or in the World War, if otherwise eligible to receive soldiers' relief under G. L., c. 115, § 17, are not deprived of the benefits conferred thereby merely because the soldier later enlisted when the country was not at war and is serving in a peace-time enlistment.

A veteran, otherwise eligible, is entitled to receive the benefits of State and military aid and soldiers' relief under the provisions of G. L., c. 115, where such veteran had an honorable discharge from his war service, although in an enlistment prior or subsequent to such war service he received a dishonorable discharge from the service, unless the dishonorable discharge be in itself the direct and proximate cause of the inability of the veteran wholly or partly to provide maintenance for himself and his dependents.

You request my opinion on the following questions: —

To the Com-
missioner of
State Aid and
Pensions.
1923
July 16.

1. Are the dependents of a person who served honorably in the war with Spain or in the World War, and later re-enlisted when the country was not at war, eligible to receive soldiers' relief when the soldier, sailor or marine is serving in a peace-time enlistment?

2. Is a veteran eligible to receive the benefits of State and military aid and soldiers' relief under the provisions of G. L., c. 115, where such veteran had an honorable discharge from his war service, but in an enlistment prior or subsequent to war service received a dishonorable discharge from the service?

1. G. L., c. 115, § 17, provides, in part, as follows: —

If a person who served in the army or navy of the United States in the war of the rebellion, in the army, navy or marine corps in the war with Spain or the Philippine insurrection between April twenty-first, eighteen hundred and ninety-eight, and July fourth, nineteen hundred and two, or in the army, navy or marine corps in the world war and received an honorable discharge from all enlistments therein, and who has a legal settlement in a town in the commonwealth, becomes from any cause, except his own criminal or wilful misconduct, poor and wholly or partly unable to provide maintenance for himself, his wife or minor children under sixteen years, or for a dependent father or mother, or if such person dies leaving a widow or such minor children or a dependent father or mother without proper means of support, such support as may be necessary shall be accorded to him or his said dependents by the town where they or any of them have a legal settlement; but should such person have all the said qualifications

except settlement, his widow, who has acquired a legal settlement in her own right before August twelfth, nineteen hundred and sixteen, which settlement has not been defeated or lost, shall also be eligible to receive relief under this section. Such relief shall be furnished by the aldermen or selectmen, or, in Boston, by the soldiers' relief commissioner, subject, however, to the direction of the city council of said city as to the amount to be paid. The beneficiary shall receive said relief at home, or at such other place as the alderman, selectmen or soldiers' relief commissioner deem proper, but he shall not be compelled to receive the same at an almshouse or public institution unless his physical or mental condition requires, or, if a minor, unless his parents or guardian so elect.

The answer to this question depends upon what is meant by the phrase "and received an honorable discharge from all enlistments therein" as used in the statute. If the Legislature intended this expression to refer to any and all enlistments in the Army and Navy, whether in time of war or in time of peace, it would follow that both of your questions must be answered in the negative. But, in my opinion, the context does not so indicate. The phraseology used seems to disclose the legislative intent that the only enlistments here referred to are enlistments in the Army or Navy of the United States "in the war of the rebellion, . . . in the war with Spain or the Philippine insurrection . . . or in the army, navy or marine corps in the world war."

The soldiers' relief provided for by G. L., c. 115, § 17, seems to be distinct from that provided for by G. L., c. 115, §§ 6 and 10. In the latter statute the context clearly demonstrates that any and all enlistments are meant, while section 17 seems to be confined to war time enlistments and service.

G. L., c. 115, § 6, provides that the recipient of State aid shall comply with certain conditions precedent, among which are the following: that he "shall have been honorably discharged from all appointments and enlistments in the army or navy, shall be so far disabled, as the result of his service in the army or navy, as to prevent him from following his usual occupation." This pertains to veterans disabled as the result of service in the Army or Navy. G. L.,

c. 115, § 10, refers to military aid, and provides that the recipient shall belong to and have the qualifications of the four classes therein enumerated. This section likewise provides that the recipient "shall have been honorably discharged or released from active duty in such United States service and from all appointments and enlistments therein." Section 10 clearly pertains to veterans whose disability arose from causes independent of military or naval service, and who would otherwise be obliged to receive relief under the pauper laws. There is likewise a requirement as to settlement or residence in the towns aiding.

While the question is not free from difficulty, owing to the various classes of State aid, military aid and soldiers' relief, and the conditions precedent pertaining thereto, outlined in the statute, I am of the opinion that the dependents of a person who served honorably in the war with Spain or in the World War, if otherwise eligible to receive soldiers' relief under section 17, *supra*, are not deprived of the benefits conferred thereby merely because the soldier later enlisted when the country was not at war and is serving in a peacetime enlistment.

In an opinion rendered the Superintendent of State Adult Poor, dated January 13, 1903 (II Op. Atty. Gen. 408), construing the above section (then R. L., c. 79, § 18), a former Attorney General said: —

The purpose of the act was undoubtedly to insure the proper maintenance of worthy veterans and their families, and the aid to be furnished to the widow or other relatives of the soldier himself was in the nature of a reward to him, and an assurance that those dependent upon him should be provided for.

2. The conclusions reached in the answer to your first question likewise control the answer to your second question. It accordingly follows that such a soldier or his dependents are entitled to soldiers' relief if he becomes from any cause, "except his own criminal or wilful misconduct, poor and wholly or partly unable to provide maintenance for himself"

or his dependents therein specified, unless the dishonorable discharge referred to in your question be in itself the direct and proximate cause of the inability of the veteran wholly or partly to provide maintenance for himself and his dependents, in which event it would seem that such veteran would not be entitled to the relief afforded by section 17 aforesaid.

I may also direct your attention to an opinion rendered by a former Attorney General (I Op. Atty. Gen. 27), in which it was decided that a man who enlisted in Massachusetts during the war of the rebellion and was honorably discharged is entitled to military aid under St. 1889, c. 279, §2, par. 3 (G. L., c. 115, § 10), notwithstanding that previous to his enlistment in Massachusetts he had been dishonorably discharged from a Rhode Island regiment.

POLICE COMMISSIONER OF BOSTON — CIVIL SERVICE —
NON-COMPETITIVE EXAMINATIONS.

The Commissioner of Civil Service alone has the power to determine whether examinations for promotion in the police force of Boston are to be by competitive or non-competitive examinations.

To the Police
Commissioner
of Boston,
1923
July 20.

You request my opinion as to whether you are compelled to consider for promotion only those members of your department whose names are certified to you from the various lists by the Commissioner of Civil Service, or whether you can, under G. L., c. 31, § 20, send to the Civil Service Commissioner, for non-competitive examination, the names of those members of your department, with special qualifications, whom you deem worthy of promotion.

The police department of the city of Boston was subject to the statutes relative to civil service, under R. L., c. 19. Under this statute the Civil Service Commissioners were authorized to make rules regulating the selection of persons to fill appointive positions in the several cities, not inconsistent with law, and of general or limited application,

among other things, to open competitive and other examinations, and to promotions, the latter, if practicable, on the basis of ascertained merit in the examination and seniority of service (R. L., c. 19, § 7), and this same power the Commission had had since the institution of the system by St. 1884, c. 320.

In the rules made by the Civil Service Commission after the passage of the Revised Laws, and continued in effect and now printed with Civil Service Law and Rules, 1922, as "Rule 28. *Promotion*," it was and is provided: —

1. In the Official Service, a promotion from one grade, as fixed by the rules or determined by the Commissioner, to another grade in the same class, shall not be valid until the candidate or candidates for promotion shall have been subjected to a competitive or non-competitive examination, as the Commissioner may decide, except as otherwise required by statute.

In other words, the Commissioner had the discretion to decide whether a promotion should be determined by competitive or non-competitive examination.

St. 1920, c. 368, § 3, provided that appointments and promotions in the police forces of cities "shall hereafter be made *only* by competitive" examination. This act applied to all cities alike, and swept away the effect of Civil Service Rule 47, by which the Commissioner had discretionary power to say whether the examination for promotion should be competitive or non-competitive. The examination was required to be competitive in every instance, and applied equally to Boston as to other cities.

The language of St. 1920, c. 368, § 3, was, however, modified by the passage of G. L., c. 31, § 20, so that the law requiring competitive examinations for promotions and appointments in the police forces did not apply to the city of Boston.

This chapter removed the prohibition imposed on the Commissioner by St. 1920, c. 368, § 3, to permit non-competitive examinations to be held, as far as the city of Boston was concerned.

The matter of appointments and promotions in the police department of the city of Boston, then, is left just where it was prior to the act of 1920, and, under the general provisions of the civil service law, R. L., c. 19, which had not been modified by any further intervening legislation, the examinations for appointment and promotion in the Boston police force were again subject to the rules and regulations of the Civil Service Commission. Rule 28 is still in force, and under it the Commissioner has the power to determine whether examinations for promotion in the police force of Boston are to be by competitive or non-competitive examination.

JURISDICTION OF THE COMMONWEALTH AND OF THE UNITED STATES — APPLICATION OF STATE PENAL STATUTES.

When the United States acquires lands within the limits of Massachusetts, with the consent of the Legislature of this Commonwealth, for the erection of a hospital, the Federal Constitution confers upon the United States the exclusive jurisdiction of the tract so acquired, and therefore penal statutes of this Commonwealth concerning the installation and use of compressed air tanks cannot constitutionally apply to contractors while engaged in work within the limits of a place under the exclusive jurisdiction of the Federal government.

To the Com-
missioner of
Public Safety.
1923
August 13.

You ask my opinion "as to the jurisdiction of the Commonwealth in requiring a contractor or sub-contractor operating as such under a Federal government contract, upon land owned by the Federal government and under Federal supervision, to meet requirements of the laws of this Commonwealth as to inspection and approval, or otherwise, of apparatus used by said contractors or sub-contractors."

It appears from the report submitted by an inspector in the Department of Public Safety, annexed to your letter, that a compressed air tank, or tank for the storage of compressed air, on the new stand-pipe installation at the Federal hospital, Leeds, Massachusetts, has been installed by certain contractors employed by the Federal government, under the general charge or direction of an officer of the United

States Army, which has not been inspected, and which, in the opinion of the inspector, does not correspond with the standard for such tanks prescribed by the Department of Public Safety, under the provisions of G. L., c. 146, §§ 34 to 41, inclusive. It is stated in said report that such tank is now upon the ground acquired by the United States, and the tank in question is being there used by the contractors in connection with the work of building a stand-pipe to be used in connection with the hospital, when the latter is completed. In connection with this tank construction is an air tank and compressor, the compressed air being used for operating pneumatic hammers.

The tank in question is actually upon the ground acquired by the United States, and is being used by the contractors employed by or for the United States in the erection of a hospital on such land, which was the particular purpose for which such land was so acquired.

The statute in question is a penal statute, there being a provision in section 41 for fine and imprisonment, or both, for any person installing, using or causing to be installed or used tanks for the storage of compressed air which have not been inspected and certified as to their safety by State inspectors, and which do not conform to certain requirements named in the statute. The statute also calls for the payment of a fee for such inspection by the owner, agent or user of such tank.

Where land has been acquired by the United States within the jurisdiction of a State, it makes no difference whether it be for a military or civil purpose; and unless the acquisition be by the State's own act, with certain restrictions agreed to by the Federal government at the time of such cession by the State, the authority of the Federal government over such land is paramount in all acts connected with the purpose for which the land was taken. Even if the State attached concessions to the ceding of the land, they will be valid only if they do not interfere with the purpose for which the jurisdiction is ceded. Congress has exclusive

jurisdiction over the lands, including "needful buildings." *Newcomb v. Rockport*, 183 Mass. 76. And the United States has the power to carry on the work for which the land was acquired in whatsoever way it sees fit, and the pursuance of such work in whatever way Congress, acting through duly appointed officers and agents, sees fit cannot be impeded by the ordinances of the State wherein the land lies, even if such ordinances be enacted to promote health and safety. The Federal government, through its agents, is the arbiter as to what means promote health and safety upon the particular work in hand. So it has been held in a leading case that the superintendent of a soldiers' home on land acquired by the Federal government is solely under the jurisdiction of Congress and is not amenable to State laws relative to the serving and use of oleomargarine. *Ohio v. Thomas*, 173 U. S. 276.

It is immaterial whether the act done on the Federal government's land be done directly by employees of the government or through contractors who, for the purpose of carrying on the work, act to some extent as the agents of the Federal government, and the contractors' employees in like manner. These all, while carrying out the work undertaken by the Federal government, are equally protected from the provisions of a penal State statute such as the one under discussion.

In *Tennessee v. Davis*, 100 U. S. 257, the court said that the government can act only through its agents and servants. If, when thus acting, within the scope of their authority, they can be arrested and brought to trial in a State court for an alleged offence against the State authority, yet warranted by the Federal authority, and if the Federal government is powerless to help them, — the operations of the Federal government may at any time be arrested at the will of one of its members.

And to the same effect see *Ex parte Siebold*, 100 U. S. 371.

So it has been held that a Federal and not a State statute as to hours of work for contractors' laborers applies on

Federal public works. *United States v. San Francisco Bridge Co.*, 88 Fed. Rep. 891. See also, *In re Turner*, 119 Fed. Rep. 231; and *In re Neagle*, 135 U. S. 1.

In *Johnson v. Maryland*, 254 U. S. 51, it was held that State laws penalizing those who operate motor trucks without having obtained licenses based on examinations and payment of a fee cannot constitutionally apply to an employee of the post office while engaged in driving a government truck over a post road, in the performance of his official duty.

Again, it has been held that State regulations relative to penalties for non-delivery of telegrams cannot apply upon land acquired by the Federal government. *Western Union Tel. Co. v. Chiles*, 214 U. S. 274.

The exclusive character of the Federal government over land acquired, to the exclusion of the police regulations of the State, has been stated with great strength in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U. S. 525.

This view of the law was taken from a very early date by the courts of Massachusetts. The Supreme Judicial Court decided that the State statute regulating the amount of stone which would be carried in a sailing vessel did not apply to a vessel at the Charlestown Navy Yard, even if used only on waters within the ordinary jurisdiction of the State. *Mitchell v. Tibbetts*, 17 Pick. 298.

The general rule is, that, under the provision in the Federal Constitution that Congress shall have power to exercise exclusive legislation in all cases whatsoever, over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of specified structures, when property is so purchased by the United States with the consent of the Legislature of the State, the Federal jurisdiction is exclusive of all State authority, and land so purchased *ipso facto* falls within the exclusive jurisdiction of the United States; and the reservation by the State accompanying its consent that civil and criminal process of the State may be served in the place purchased

is not considered as interfering in any respect with the supremacy of the United States over it, but is admitted to prevent such place from becoming an asylum for fugitives from justice. *Commonwealth v. Clary*, 8 Mass. 72.

The statutory provision as to the Commonwealth's retaining concurrent jurisdiction for the execution of all civil and criminal process is found in G. L., c. 1, § 7, but, in order that the United States may possess exclusive legislative power over the tract it must have acquired the tract with the consent of the State. By G. L., c. 1, § 7, general consent was given in the matter of marine hospitals, custom offices, post offices, lighthouses, etc. There are many instances where the Commonwealth, by legislation, has consented to the acquisition of land of this Commonwealth. Recent examples are: property in the town of Rutland, St. 1922, c. 409; Camp Devens, St. 1921, c. 456; land in South Boston, Gen. St. 1919, c. 270.

As to the land in question, located at Leeds, in the city of Northampton, the facts furnished me through your department are simply to the effect that the ownership of the land passed to the United States government as a gift from the citizens of Northampton. It does not appear that the land has been acquired with the consent of the Legislature of this Commonwealth.

Accordingly, for a decisive opinion on the questions raised by you, as to whether or not the statutory provisions relative to the use of the air tank are effective, it would be necessary to have full information as to the acquisition of the tract by the Federal government.

CITY ORDINANCES — APPROVAL OF THE ATTORNEY GENERAL.

An ordinance of a city which has adopted Plan B as a plan of government, under Gen. St. 1915, c. 267, is not subject to the requirements of G. L., c. 40, § 32, and takes effect without the approval of the Attorney General.

You ask my opinion whether it is necessary to submit to me, for my approval, ordinances of the city of Cambridge. You state that the question has been raised in connection with a complaint under an ordinance of the city of Cambridge relating to traffic regulations passed and approved by the mayor in 1917.

To the City
Solicitor of
Cambridge.
1923
August 16.

I have some doubt whether it is within my province to give the opinion which you request, but I have concluded that under the circumstances it is proper to do so.

G. L., c. 40, § 22, authorizes a city or town to make ordinances or by-laws for the regulation of carriages and vehicles used therein, except as otherwise provided in G. L., c. 90, § 18 (authorizing special regulations as to the speed and use of motor vehicles). In view of this statute no question can be made that the ordinance in question is outside the scope of proper municipal legislation. The sole question is whether or not it was invalid because the provisions of G. L., c. 40, § 32, were not complied with. Said section is as follows: —

Before a by-law takes effect it shall be approved by the attorney general, and shall be published at least three times in one or more newspapers, if any, published in the town, otherwise in one or more newspapers published in the county; or instead of such publication, notice of the by-laws shall be given by delivering a copy thereof at every occupied dwelling or apartment in the town, and affidavits of the persons delivering the said copies, filed with the town clerk, shall be conclusive evidence of proper notice hereunder; provided, that any by-law in force upon May sixteenth, nineteen hundred and four, shall not be subject to this section.

The requirement that a by-law, before taking effect, should be approved by the Attorney General was made by an amendment passed in 1904 (St. 1904, c. 344, § 1). Prior to that

time the statutes required that by-laws should receive the approval of the Superior Court. (See R. L., c. 25, § 26.)

There are certain statutory provisions under which the contention may be made that statutes relating to town by-laws should be construed to include city ordinances.

G. L., c. 4, § 7, cl. 22, provides: —

“Ordinance,” as applied to cities, shall be synonymous with by-law.

G. L., c. 40, § 1, is as follows: —

Cities and towns shall be bodies corporate, and, except as otherwise expressly provided, shall have the powers, exercise the privileges and be subject to the duties and liabilities provided in the several acts establishing them and in the acts relating thereto. Except as otherwise expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special law, and all laws relative to towns shall apply to cities.

You state that, prior to 1915, the city of Cambridge was governed under the old Cambridge charter, granted by St. 1891, c. 364, section 15 of which is, in part, as follows: —

The city council shall have power to make ordinances and to fix penalties therein, as provided herein and by general law, which shall take effect from the time therein limited, without the sanction or confirmation of any court or justice thereof. All city ordinances shall be duly published, and in such newspaper or newspapers in said city as the city council shall direct.

You state further that Cambridge, in 1915, adopted as a new charter Plan B of Gen. St. 1915, c. 267. This chapter contains general provisions and special provisions under Plan B for the passage of ordinances by a city council, and the approval of them by the mayor. (See pt. I, §§ 1-4, 8, and 20-23; pt. III, §§ 4 and 8.) Pt. I, § 23, requires proposed ordinances, except emergency measures, to be published once before passage and once afterwards. Pt. III, § 8, provides, in part, as follows: —

Every order, ordinance, resolution and vote relative to the affairs of the city, adopted or passed by the city council, shall be presented to the mayor for his approval. If he approves it he shall sign it; if he disapproves it he shall return it, with his objections in writing, to the city council, which shall enter his objections at large on its records, and again consider it. If the city council, notwithstanding such disapproval of the mayor, shall again pass such order, ordinance, resolution or vote by a two thirds vote of all the members of the city council, it shall then be in force, but such vote shall not be taken for seven days after its return to the city council. Every such order, ordinance, resolution and vote shall be in force if it is not returned by the mayor within ten days after it has been presented to him.

Pt. I, § 11, provides that, upon the adoption of one of the plans of government provided for in the act, "the provisions of this act, so far as applicable to the form of government under the plan adopted by the city, shall supersede the provisions of its charter and of the general and special laws relating thereto and inconsistent herewith."

G. L., c. 40, § 32, is a law relative to towns. By G. L., c. 40, § 1, it is made applicable to cities, except as otherwise expressly provided. In my opinion, the charter under which the city of Cambridge is governed does otherwise provide, and therefore section 32 is not applicable.

I am confirmed in this opinion by the case of *Commonwealth v. Davis*, 140 Mass. 485. That was a complaint for violation of an ordinance of the city of Boston. The defendant contended that the ordinance was invalid because it had not been recorded in the clerk's office, as required by Pub. St., c. 27, § 21, providing that "before any by-law takes effect it shall be approved by the Superior Court, or in vacation by a justice thereof, and shall with such approval be entered and recorded in the office of the clerk of the courts in the county where the town is situated, or in the county of Suffolk in the office of the clerk of the Superior Court for civil business." The court held that this provision applied only to the by-laws of towns, and by statutory enactment to cities only so far as not inconsistent with general or special provisions relating thereto, that the

provisions were inconsistent with the special provisions of the charter of Boston, and therefore were not applicable. It is true that in that case the charter expressly provided that the city ordinances should take effect without the sanction or confirmation of any court or other authority whatsoever. The sections which I have referred to in the statute constituting the charter of the city of Cambridge seem to me also to make city ordinances effective when passed and approved as therein provided.

MASTER PLUMBERS — REGISTRATION — NON-RESIDENT —
BUILDING DEPARTMENT OF THE CITY OF BOSTON.

A master plumber who has a regular place of business and performs plumbing work by himself or by his journeymen may lawfully be registered under the provisions of existing statutes, even if he is not a resident of the state.

To the Com-
missioner of
Public Health.
1923
August 20.
—

You ask my opinion regarding a question of mixed law and fact contained in a letter written by the building commissioner of Boston, to the secretary to the State Examiners of Plumbers. The question is phrased in the letter as follows: —

Three brothers, one of whom is a licensed master plumber, entered into a partnership to perform plumbing. They registered in the office of the building department, the registration being signed by the brother who is licensed as a master plumber but is not a resident of Boston, being a resident of Chicago. The question is: In your opinion, can the building department of the city of Boston recognize this registration as being in accordance with the requirements of G. L., c. 142, § 3, and St. 1907, c. 550, § 113?

St. 1907, c. 550, above referred to, has been in large part amended by St. 1909, c. 536, and by later statutes. The provisions regarding master plumbers, contained in these earlier acts, are embodied in G. L., c. 142, § 3. In this chapter a master plumber is defined as "a plumber having a regular place of business and who, by himself or journeymen plumbers in his employ, performs plumbing work."

In section 3 it is provided that no person shall engage in the business of a master plumber unless he is lawfully registered or has been licensed.

It is not the province of the Attorney General to pass upon questions of fact, but from the statement of facts contained in the letter which embodies the question you desire answered, it does not appear but that the registration of the master plumber in question was properly made, without fraud, and in accordance with the usual mode of registration; and the matter which gives rise to the question of a possible illegality relative to this registration appears to be due only to the fact that at the time of such registration the master plumber was not a resident of Boston but a resident of Chicago, and is still a resident of Chicago, although doing business in the city of Boston.

There is nothing in the provisions of the General Laws, nor in any of the numerous acts dealing with master plumbers previously enacted, which requires that a master plumber shall be a resident of the city of Boston, or even of the Commonwealth of Massachusetts, for the purpose of being registered under the provisions of this and similar statutes. It is required as a prerequisite of such registration that such master plumber shall have a regular place of business and perform plumbing work by himself or by his journeymen. There is nothing in the statutes which tends to indicate that a master plumber cannot carry on business in this Commonwealth and still be a resident of a city outside the Commonwealth. There would seem, therefore, no reason why the building department of the city of Boston should not recognize the registration of such a master plumber as is described in your letter. The further fact, that the partners of the master plumber are not themselves licensed master plumbers, is of no special importance upon this aspect of the matter, provided that the firm has one properly licensed master plumber. See *Burke v. Board of Health*, 219 Mass. 219.

INSURANCE — FRATERNAL BENEFIT SOCIETY — MORTUARY
FUNDS — INTEREST ON CERTAIN LOANS.

A fraternal benefit society may not, under G. L., c. 176, place a portion of its mortuary fund in a separate fund and then disburse it for expenses incidental to the growth or strengthening of the society.

Interest due upon money borrowed by a fraternal benefit society for its death fund is an item of expense which, under G. L., c. 176, should be repaid from the expense account of such society.

To the Com-
missioner of
Insurance.
1923
September 6.

You have asked my opinion upon two questions relative to the mortuary funds of fraternal benefit societies.

The first question is: "Whether or not the use of money for expense purposes under such circumstances (i.e., those set forth in the first and second paragraphs of your letter) is authorized by the provisions of G. L., c. 176."

The circumstances referred to are stated in your letter to be as follows: —

The Catholic Order of Foresters of Chicago, Illinois, is a foreign fraternal benefit society which is subject to the provisions of the G. L., c. 176.

During the year 1922, the society readjusted its mortuary assessment rates, and, as a result of making this readjustment, transferred from its mortuary fund to the surplus revenue fund \$8,693,421.25. The money transferred was money received apparently from assessments levied upon the members for death purposes and the accretions of said fund. \$160,000 of this money was transferred from the surplus revenue fund to a fund called the readjustment fund, and said readjustment fund, to the amount of \$120,567.70, was used for paying the expenses of the readjustment.

G. L., c. 176, §§ 13 and 14, provide: —

SECTION 13. Any society may create, maintain, invest, disburse and apply a death fund, any part of which may in accordance with the by-laws of the society be designated and set apart as an emergency, a surplus or other similar fund, and a disability fund. Such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein, or become entitled to any part thereof, except as provided in section sixteen, seventeen or nineteen. The funds from which benefits shall be paid shall be derived and the fund from which the expenses of the society shall be defrayed may be derived from periodical or other payments by the members of the society and accretions of said funds; provided, that

no society shall be incorporated, and no society not authorized on January first, nineteen hundred and twelve, to do business in the commonwealth shall be admitted to transact business therein, which does not provide for stated periodical contributions sufficient to meet the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress August twenty-third, eighteen hundred and ninety-nine, or any higher standard, with interest assumption not more than four per cent per annum, except societies providing benefits for disability or death from accident only.

SECTION 14. Every provision of the by-laws of the society for payment by members of such society, in whatever form made, shall distinctly state the purposes of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses.

The Attorney General, of course, does not undertake to pass upon questions of fact, as such. The circumstances, as you set them forth, indicate that the benefit society had created a death fund, and by appropriate by-laws had designated and set apart a portion of such death fund in a surplus revenue fund, so called, and later created a readjustment fund, so called, to which \$120,567.70 of the money previously placed in the surplus fund was removed and paid out to defray the expenses incidental to a readjustment of the assessment rates of the society, which was then made.

Section 14, above quoted, states specifically that "no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses." This rule seems plain and absolute. No difference is made by its terms between ordinary expenses of management and extraordinary expenses. The designation of part of the death fund as separate funds, under the provisions of section 13, does not disabuse the parts of the death fund so designated of their inherent character as moneys collected for mortuary purposes, and no such designation can free them from the limitations imposed by section 14. The provisions of

section 13, while authorizing the division of the death fund into emergency and other funds, keep alive and recapitulate the existence of the mortuary fund from which benefits are to be paid as a unit, and designate the fund from which expenses are to be paid as a separate entity. The phrase in section 13 concerning the different funds into which the mortuary fund may be divided — “such funds shall be held, invested and disbursed for the use and benefit of the society” — does not divest the funds of their character as funds applicable to the payment of benefits eventually, and permit their being used to defray expenses. Moreover, all the funds made out of the mortuary fund under section 13 are charged with the special interest therein which may accrue to members under the provisions of sections 16, 17 and 19.

It is apparent from reading together all the sections of this chapter that the funds derived from a division of the mortuary fund are all charged with the same limitations as the original fund, and are intended by the statute to constitute only reserve sections, as it were, of the original fund. They all exist primarily to make sure the payment of the death benefits and the prerogatives of the members to which they later may become entitled under sections 16, 17 and 19, and they cannot be diverted from their primary purpose to pay expenses of the society, either usual or unusual. The words “disbursed for the use and benefit of the society” (§13, line 5) do not signify a disbursement for a purpose foreign to the one for which, as part of the death fund, they were created. The payment of the expenses of the society is not the purpose for which they were created. A totally different mode of paying the expenses of the society is indicated by the statute.

It has been specifically held that where the statutory rule forbids the payment of expenses from funds collected for or charged with the payment of death benefits, it is not lawful to use such funds for expenses. *Chicago Mutual Life Ind. Assn. v. Hunt*, 127 Ill. 257. Nor for the expense involved in a campaign to strengthen the society by ob-

taining new members. *Wolf v. Germania Ins. Co.*, 149 Wis. 576.

To permit a benefit society to place part of its mortuary fund in a separate fund under another name, and to disburse this portion of the mortuary fund, so set aside, for expenses incidental to the growth or the strengthening of the society, would be to open the road for the withdrawal of all the funds primarily intended to secure the payment of claims, and to permit their disbursement in an entirely different manner, which might be highly prejudicial to the rights of members and defeat the entire purpose of the statute in this respect. The statute makes no distinction between usual expenses and unusual expenses such as those incurred in arranging for an adjustment of rates.

There is nothing in the recent case of *Delaney v. Grand Lodge A. O. U. W.*, 244 Mass. 556, which modifies or affects the principle here involved.

I must therefore answer your first question to the effect that the use of money for expense purposes, under the circumstances which you describe, is not authorized by G. L., c. 176.

Your second question is: "Whether a fraternal benefit society which borrows money for its death fund has the right, under the statute, to pay from its death fund interest for the use of said money, or is said interest an expense which should be disbursed from the expense account."

It is not contemplated, under the provisions of G. L., c. 176, that the death fund shall be depleted except by payments to beneficiaries, for whose benefit it was established. Although the borrowing of money to prevent the depletion of the death fund in some emergency indirectly enures to the benefit of the immediate recipients of payments from the fund, the principal of the fund will suffer by paying for the temporary help, to the detriment of future claim holders. The cost of borrowing money is an expense. The statute is aimed to prevent the depletion of the death fund by expenses incurred by the society, for whatever

purposes and with whatever good intentions. It contemplates the discharge of such indebtedness by an entirely separate and independent fund. Under such circumstances as your question discloses, payment of interest is an expense, and it should not be paid out of the death fund.

GASOLINE — NECESSARIES OF LIFE — CONSTRUCTION OF
STATUTE — SPECIAL COMMISSION ON THE NECES-
SARIES OF LIFE.

The words "necessaries of life" mean literally things necessary to sustain life, and naturally connote commodities of prime importance, such as food, fuel, clothing and housing.

The words "necessaries of life," as used in Mass. Const. Amend. XLVII, have a broad and elastic meaning, the intention being that the powers thereby given to the Legislature should extend to such things as may be fairly termed "necessaries," from time to time, with the changing needs of the community.

The question whether gasoline was intended by the Legislature to be included in the class of "commodities which are necessaries of life," as to which the special Commission on the Necessaries of Life was given certain powers and duties by St. 1921, c. 325, is a question of interpretation, involving a consideration of the language used and of the objects sought to be accomplished in that and other statutes where the same words have been used.

Gasoline, while it is an important factor in the transportation of necessaries of life, is not itself a "necessary of life," within the meaning of St. 1921, c. 325.

Whether the sale of gasoline is a "business which relates to or affects" necessaries of life, under St. 1921, c. 325, is a question of fact for the Commission to determine.

To the Com-
missioner on
the Necessaries
of Life.
1923
September 7.

You request my opinion as to whether or not gasoline is a necessary of life, under the provisions of St. 1921, c. 325, as extended by St. 1922, c. 343, and St. 1923, c. 320, which creates and defines the powers and duties of your commission.

In answering your question it is necessary to study the history of the passage of the present and preceding acts.

A special Commission on the Necessaries of Life was established by Gen. St. 1919, c. 341. This enactment was preceded by Gen. St. 1917, c. 342, known as the "Commonwealth Defence Act of 1917," and by an amendment to the Constitution, in both of which provision was made for the exercise of control over the supply of necessaries of life.

Accordingly, reference should first be made to these earlier provisions and acts done thereunder.

Gen. St. 1917, c. 342, approved May 26, 1917, contained the following provision:—

SECTION 23. Whenever the governor, with the advice and consent of the council, shall determine that an emergency has arisen in regard to the cost, supply, production, or distribution of food or other *necessaries of life* in this commonwealth, he may ascertain the amount of food, or other *necessaries of life* within the commonwealth; the amount of land and labor available for the production of food; the means of producing within or of obtaining without the commonwealth food or other *necessaries of life* as the situation demands; and the facilities for the distribution of the same, and may publish any data obtained relating to the cost or supply of such food or other necessities, and the means of producing or of obtaining or distributing the same. In making the said investigation he may compel the attendance of witnesses and the production of documents, and may examine the books and papers of individuals, firms, associations and corporations producing or dealing in food or other *necessaries of life*, and he may compel the co-operation of all officers, boards, commissions and departments of the commonwealth having information that may assist him in making the said investigation.

The purpose of the statute was declared by section 1 to be “to provide for the safety, defence and welfare of the commonwealth and for the discharge of its duties toward the national defence as one of the United States.” By section 6 the Governor was authorized, whenever he believed it necessary or expedient, to take possession of and to fix minimum and maximum prices for certain kinds of property therein enumerated, including land, machinery, means of conveyance, provisions, fuel and other means of propulsion. These were not described as necessities of life. By section 12 the Governor was authorized, with the approval of the Council, to confer on other persons the powers to do in his name whatever might be necessary to carry into effect the powers which the act conferred upon him.

After the passage of this statute a “Fuel Director” was appointed, to have supervision over the cost, supply and distribution of coal within the Commonwealth. (See VI

Op. Atty. Gen. 63.) There was also appointed a "Committee of Public Safety," which may have exercised some of the powers conferred by section 23. So far as I am advised, however, no executive action was ever taken under this statute to investigate or to regulate the cost, supply or distribution of gasoline.

Mass. Const. Amend. XLVII was submitted to the people October 11, 1917, and was adopted November 6, 1917. This amendment is as follows:—

The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common *necessaries of life* and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine.

By Gen. St. 1919, c. 341, there was established for one year from August 1, 1919, a special commission to be known as the Commission on the Necessaries of Life. By section 1 of said statute it was provided that:—

It shall be the duty of said commission to study and investigate the circumstances affecting the prices of the commodities which are *necessaries of life*. The commission may inquire into all matters relating to the production, transportation, distribution and sale of the said commodities, and into all facts and circumstances relating to the cost of production, wholesale and retail prices and the methods pursued in the conduct of the business of any persons, firms or corporations engaged in the production, transportation, or sale of the said commodities, or of any business which relates to or affects the same.

This statute was amended by Gen. St. 1919, c. 365, by adding, after the provision quoted above, the following:—

It shall also be the duty of said commission to study and investigate the circumstances affecting the charges for rent of property used for living quarters or for the production of *necessaries of life*, and in such investigation the commission may inquire into all matters relating to charges for rent.

St. 1920, c. 610, purports to continue to January 1, 1922, those provisions of the Commonwealth Defence Act of 1917 "relating to the appointment, duties, authority and powers of a fuel administrator." (See VI Op. Atty. Gen. 63.)

St. 1920, c. 628, extended the term of service of the special Commission on the Necessaries of Life to March 1, 1921. It contains, also, a further provision as follows: —

SECTION 5. In the public emergency which exists, and which may exist for an indefinite period, and in order to insure an adequate supply of the *necessaries of life* for the people of the commonwealth, including housing facilities, the provisions of the Commonwealth Defence Act of nineteen hundred and seventeen, being chapter three hundred and forty-two of the General Acts of nineteen hundred and seventeen, relating to the appointment, duties, authority and powers of a food administrator, are hereby made operative until March first, nineteen hundred and twenty-one. If the said emergency continues, the governor is hereby authorized to appoint, under the provisions of said chapter, one or more administrators as he may deem the emergency requires, or to designate the commission on the necessaries of life to act in that capacity.

St. 1921, c. 325, established for the term of one year from May 1, 1921, a special commission to be known as the Commission on the Necessaries of Life, of which one member is to act as chairman and fuel administrator. Section 2 provides as follows: —

It shall be the duty of the commission to study and investigate the circumstances affecting the prices of fuel and other commodities which are necessaries of life. The commission may inquire into all matters relating to the production, transportation, distribution and sale of the said commodities, and into all facts and circumstances relating to the cost of production, wholesale and retail prices and the method pursued in the conduct of the business of any persons, firms or corporations engaged in the production, transportation, or sale of the said commodities, or of any business which relates to or affects the same. It shall also be the duty of the said commission to study and investigate the circumstances affecting the charges for rent of property used for living quarters, and in such investigation the commission may inquire into all matters relating to charges for rent.

The term of service of this commission was extended for one year by St. 1922, c. 343, and was again extended to May 1, 1924, by St. 1923, c. 320.

Reference should also be made to Res. 1922, c. 50, providing, in part, as follows:—

Resolved, That the special commission on the necessities of life be authorized and directed to inquire into the subject of the retail distribution and sale of gasoline and refined petroleum products, with special reference to the means and methods whereby competition in such sale and distribution has been substantially eliminated and conditions of monopoly established. . . .

The attorney general is hereby directed to place at the disposal of the commission the services of an assistant attorney general for the purposes of the investigation herein provided for. For said purposes, the commission may exercise all the powers conferred upon it by chapter three hundred and twenty-five of the acts of nineteen hundred and twenty-one and chapter three hundred and forty-three of the acts of the current year, and the said products shall, for the purposes of this investigation be deemed "necessaries of life" within the meaning of said chapters three hundred and twenty-five and three hundred and forty-three. The commission shall report the results of its investigation to the general court not later than the second Wednesday in January, nineteen hundred and twenty-three, with drafts of such proposed legislation as may be necessary to carry its recommendations into effect.

Acting under this provision, the Commission did make an investigation into the distribution and sale of gasoline as directed in the resolve, but it has never made any other investigation of that subject. The fact that the Legislature here expressly provided that gasoline, "for the purposes of this investigation," should be deemed a necessary of life furnishes some argument that in the 1921 statute they did not intend that gasoline should be included as a necessary of life.

Prior to the Commonwealth Defence Act of 1917, the words "necessaries of life" were used in the so-called "Dubuque Law," St. 1898, c. 549, § 1 (G. L., c. 225, § 1), providing for equitable process after judgment in cases where the judgment is founded on a claim for necessities of life. There

is no decision of the court construing the words "necessaries of life" in a case arising under this statute which throws light upon the present question.

The words "necessaries of life," taken literally, must mean things necessary to sustain life. They naturally connote commodities of prime importance, such as food, fuel, clothing and housing. (See VI Op. Atty. Gen. 251.) The word "necessaries," alone, may have that restricted meaning. *International Textbook Co. v. Connolly*, 206 N. Y. 188.

As applied to an infant, the term "necessaries" has been given a broader meaning, so that it includes articles of utility suitable to the station in life which the person occupies. *Davis v. Caldwell*, 12 Cush. 512; *Raynes v. Bennett*, 114 Mass. 424; *Conant v. Burnham*, 133 Mass. 503; *Hamilton v. Lane*, 138 Mass. 358; *Jordan Marsh Co. v. Cohen*, 242 Mass. 245, 249. But, under the insolvency statute, it was held by Chief Justice Shaw that the word was to be construed strictly and in reference to the purpose for which it was introduced. *Prentice v. Richards*, 8 Gray, 226. In admiralty law, necessaries are held to be articles needed to enable a ship to prosecute the particular business in which she is engaged. *The Penn*, 273 Fed. 990, 991.

Under the Lever Act (Act of August 10, 1917, c. 53, as amended by Act of October 22, 1919, c. 80) Congress provided for the exercise of control over foods, feeds, wearing apparel, fertilizer and certain implements, which in the act were called necessaries. It was held that under this act "necessaries" included only the articles specified in the act. *United States v. American Woolen Co.*, 265 Fed. 404; *cf. C. A. Wood & Co. v. Lockwood*, 264 Fed. 453; *Merritt v. United States*, 264 Fed. 870. I believe that under this act no attempt was made to exercise control of the production, distribution or sale of gasoline.

In dealing with the question of the meaning of "necessaries of life," as used in the instant act, it is apparent that little help can be derived from precedents established by judicial decisions, because the words must be defined in the light

of the purpose for which the legislation was enacted, and, as so used, they have a different connotation from that which has been given to them in cases which have heretofore come before the courts.

The question whether a given article is a necessary is said to be largely a question of fact; but the tribunal determining that question is entitled to instruction to aid it in such determination, and also to a ruling when, as a matter of law, articles of a certain kind do not come within the class of necessities. *Davis v. Caldwell*, 12 Cush. 513; *Raynes v. Bennett*, 114 Mass. 424; *Hamilton v. Lane*, 138 Mass. 358; *Jordan Marsh Co. v. Cohen*, 242 Mass. 245, 249.

Mass. Cont. Amend. XLVII has already been referred to and quoted in full. An examination of the records of the debates of the Constitutional Convention, which presented this amendment to the people, is not particularly illuminating in regard to gasoline. The amendment, as it was originally introduced in the Convention in 1917, when the general thoughts of the Convention were directed primarily to the necessities of war, was referred to as a public trading amendment, and was as follows: —

The General Court may authorize the Commonwealth to take by purchase or otherwise foodstuffs, fuel, ice and other *necessaries of life*, and to sell the same to the inhabitants thereof or to any county, city, town or other municipal corporation therein; and may authorize municipalities to buy and to sell to their inhabitants such *necessaries of life*, and to harvest and manufacture ice. The General Court may authorize the establishment, maintenance and operation by the Commonwealth, cities and towns, of markets, docks, fuel and coal yards, elevators, warehouses, canneries, slaughter-houses and other like means for producing, selling and distributing the necessities of life.

The long and strenuous debate which ensued, and which was carried on chiefly by Mr. Clapp, of Lexington, Mr. Anderson, of Brookline, Mr. Washburn, of Worcester, Mr. Pillsbury, of Wellesley, and Mr. Lomasney, of Boston, was devoted primarily to a discussion of the general propriety of the Commonwealth's engaging in various kinds of business

enterprises and as to what should constitute a public emergency. Very little attention, if any, was paid specifically to the discussion of what were necessities of life. Originally, it was attempted to enumerate and define necessities by the use of such words as foodstuffs, fuel, ice, housing, feed, etc., the intention of some members being, apparently, from their remarks, to confine the authority given by the amendment to the exact articles enumerated. If this had been finally done the situation would have been as it was under the Federal act, where Congress had defined "necessaries" by enumerating certain commodities, and the Federal courts held that those commodities, and those only, could be regarded as necessities of life under the Federal act. There was, however, opposition to this limitation from the outset, and from the debates it appears to have been the consensus of opinion that the power of the Legislature should not be so curtailed, but that scope should be left for it to deal with all things which might be fairly termed "necessaries," from time to time, with the changing needs of the community, and which could not then be in the mind of the Convention. In the debates it was admitted by every one that the term "necessaries of life" was an undefined term, open to debate and decision at any period in the life of the State. In the early stages of the discussion Hon. George W. Anderson, now a judge of the United States Circuit Court of Appeals, suggested in one of his speeches to the Convention (Debates, C. C. vol. I, 642) —

We have limited the first provision to foodstuffs, fuel, ice and other necessities. What may be a necessary I agree is a matter sometimes open to debate. I know of no method by which you can avoid that possible difficulty in the constitutional grant of power. I think it should be left for the Legislature to determine what is necessary, naming it in the legislation enacted.

After a very considerable amount of debate, however, which was mostly directed toward the proposed trading activities of the Commonwealth, the trading feature was

gradually dropped out of sight, more or less by common consent. At length the amendment in its present form was adopted.

In the whole course of the debate I cannot find anything which throws any light upon the intention of the Convention as to what should or should not be considered necessities, other than the common agreement that food, fuel, clothing, ice and housing were undoubtedly necessities, the admission that there were other probable necessities of life, and the apparent intention of the Convention to leave the amendment so elastic as not to bind the judgment of the Legislature in future times with new economic developments before it.

But the question on which my opinion is asked is not whether gasoline is a necessary of life within the broad and elastic meaning of those words as used in the amendment, but whether it was intended by the Legislature to be included in the class of "commodities which are necessities of life," as to which your commission was given certain powers and duties by St. 1921, c. 325. This question of interpretation of the legislative will involves a consideration of the language used and of the objects sought to be accomplished in that and other statutes where the same words have been used. *Moore v. Stoddard*, 206 Mass. 395, 399; *Commonwealth v. Dee*, 222 Mass. 184; *Duggan v. Bay State St. Ry. Co.*, 230 Mass. 370, 374. The meaning of the words used in a statute is a question of law. *Boston v. Boston Elevated Ry. Co.*, 213 Mass. 407, 411; *Selectmen of Natick v. Boston & Albany R. R. Co.*, 210 Mass. 229, 232.

The ordinary necessities of life undoubtedly are food, fuel, clothing and housing facilities. Food, fuel and housing facilities are expressly mentioned by the Legislature.

In determining whether a commodity is a necessary of life careful distinction must be made between necessities of life and the *means* of producing, transporting and distributing such necessities. Such means, though vital factors in sustaining life, cannot be regarded as necessities of life within the purview of the statute. Were this not

so, there would be, in our present condition of social life, very few commodities which could not be classed as necessities of life. Such result was not intended by the act. It is a known fact, of which perhaps judicial notice may be taken, that transportation of food by motor trucks is a vital factor in keeping the markets of cities properly supplied. Gasoline is a necessary element in such transportation but is no more necessary than the motor truck. Plainly, motor trucks are not necessities of life within the purview of the statute, nor are farming implements, though the soil cannot be tilled and farm produce raised without them. I am therefore of the opinion that gasoline, while it is an important factor in the transportation of necessities of life, is not itself a "necessary of life" within the meaning of the statute.

Your powers are not, however, limited to investigating the prices of necessities of life. Under the statute it is your duty to inquire "into all matters relating to the production, *transportation*, distribution and sale of the said commodities, and into all facts and circumstances relating to the cost of production, wholesale and retail prices, and the method pursued in the conduct of the business of any persons, firms or corporations engaged in the production, *transportation*, or sale of the said commodities, or of *any business which relates to or affects the same*."

Under certain circumstances the sale of gasoline may be a "business which relates to or affects" necessities of life or may be a factor in affecting the prices of such commodities. Whether or not that condition exists is a question of fact for you to determine. If it does, I am of the opinion that you may investigate the price of gasoline in so far as it affects necessities of life.

INSURANCE — BROKER'S LICENSE — FEE — WAR SERVICES
— INDUCTION FROM A DRAFT BOARD — DISCHARGE.

An applicant for an insurance broker's license under G. L., c. 175, § 166, is not exempt from paying the fee prescribed by said section, on the ground that he has "served" in the Army of the United States, if he was inducted from a draft board, but was discharged before being mustered into the Federal service.

An "induction" from the draft is not the equivalent of "service" in the Army. To have "served" in the Army a person must not only have been inducted from the jurisdiction of a draft board, but must also have been through the further process of being "mustered into" or enrolled in the service.

A "discharge from the draft" is not intended to be the equivalent of an honorable discharge for those who have actually been mustered into the service of the United States.

To the Com-
missioner of
Insurance.
1923
September 13.

You request my opinion as to whether a certain applicant for an insurance broker's license under G. L., c. 175, § 166, is exempt from paying the fee prescribed by said section, on the ground that the applicant in question comes within that clause of section 166 which provides that —

No fee for a license issued hereunder shall be required of any soldier, sailor or marine resident in this commonwealth who has served in the army or navy of the United States in time of war or insurrection and received an honorable discharge therefrom or release from active duty therein, if he presents to the commissioner satisfactory evidence of his identity.

It appears from your letter and from the copy of a document annexed thereto, which has been presented to you by said applicant as evidence of his right to exemption from the payment of the said fee, that the applicant was inducted into the military service of the United States from the jurisdiction of the Local Board for Division 9, Philadelphia, on Nov. 11, 1918, and was discharged from the military service of the United States "by reason of cancellation of induction call" on the same day.

The document presented by the applicant is entitled "Discharge from Draft." It bears on its face these words: —

NOTE. — This form will be used for discharge of aliens and alien enemies and of men rejected on account of physical unfitness, dependency, . . .

The answer to your question turns upon what is meant by "served" in the army of the United States, as used in G. L., c. 175, § 166. I am of the opinion that the words used in the document entitled "Discharge from Draft," presented by the applicant, which state that he "was inducted into the service from the jurisdiction of the Local Board for Division 9, Philadelphia," are not of themselves sufficient to establish the fact that the applicant "served in the army of the United States," within the meaning of the statute under consideration.

An "induction" from the draft is not the equivalent of "service" in the army. To have "served" in the army a person must not only have been inducted from the jurisdiction of a draft board, but must also have been through the further process of being "mustered into" or enrolled in the service. After induction from the draft board the person so inducted is to a certain extent under martial law, so far that he may be treated as a deserter if he does not properly report thereafter, but he has yet to undergo a physical examination, and is subject to discharge without actual enrollment, for physical disability or a number of other causes which may be found to exist. *French v. Sangerville*, 55 Me. 69; *Mahoney v. Lincolnville*, 56 Me. 450; *Reed v. Sharon*, 35 Conn. 191; *Bickford v. Brooksville*, 55 Me. 89.

In construing the soldiers' bonus law the Attorney-General has ruled that the provisions of Gen. St. 1919, c. 283, granting a war bonus to men honorably discharged from the service of the United States in the World War, do not apply to drafted men who were passed by the draft board, sent to army camps and there discharged because physically disqualified or for misconduct or on similar grounds. See V Op. Atty. Gen. 405. In that opinion a former Attorney-General used the following language:—

In my judgment, . . . it cannot be said that the class of men to which you refer was enlisted in or had been enrolled in or had been mustered

into the Federal service, within the meaning of this statute. These men were never in the army of the United States to a sufficient extent to be discharged from it. In my opinion, it cannot be said that they performed "services . . . in the army . . . of the United States" of the character intended by this statute to be recognized. Accordingly, I must advise you that men of the class to which you refer are not entitled to the benefits of the statute.

This department has also ruled that the exemption from all poll taxes granted by Gen. St. 1919, c. 9, does not include persons summoned in the draft, who reported for duty, but were discharged before they were mustered into the Federal service. V Op. Atty. Gen. 601.

A similar conclusion was reached by the Supreme Court of Rhode Island in *Bannister v. Soldiers' Bonus Board*, 43 R. I. 346.

In the "Discharge from Draft" which the present applicant presents to you it is evident, from the "note" which is made a part of the form, that it is not intended to be the equivalent of an honorable discharge for those who have actually been mustered into the service of the United States, but is a form used for those who have presented themselves as drafted men but have not actually been enrolled because of some disqualification. It is apparent, also, from the wording of the body of the document, that the applicant was discharged upon the very day of his induction, and that the reason for his discharge was the "cancellation of induction call." There is nothing in the document entitled "Discharge from Draft" which indicates that the applicant was mustered into or enrolled or served in the Army of the United States so as to bring him within the provisions of G. L., c. 175, § 166, which exempts those who have served as soldiers in the Army of the United States, and have been honorably discharged therefrom or released from active duty therein, from paying a fee for a license to engage in the insurance business.

TEACHERS' RETIREMENT BOARD — MEMBERSHIP — PAYMENT OF BACK ASSESSMENTS IN INSTALMENTS — PAYMENTS IN ANTICIPATION OF MEMBERSHIP.

A rule of the Teachers' Retirement Board permitting a teacher who served prior to July 1, 1914, to join the association, paying his back assessments in instalments, is not consistent with law, and therefore is invalid.

G. L., c. 32, § 7, par. (3), defines the only terms upon which teachers who served in the public schools of Massachusetts prior to July 1, 1914, are permitted to become members of the State Teachers' Retirement Association at any time before attaining the age of seventy; and said statute contains no provision whereby an applicant for membership may make payments of back assessments in instalments.

No authority is granted by the statute creating the Retirement Board which permits the board to receive deposits from applicants in anticipation of membership.

You desire my opinion upon the following questions: —

To the Commissioner of
Education.
1923
September 18.

1. Did the Teachers' Retirement Board have the right to adopt a rule allowing a teacher who served prior to July 1, 1914, to join the association, paying his back assessments in instalments?

2. If the Retirement Board has not the right to permit teachers to join the Retirement Association under the provisions of the aforesaid rule, may the board allow teachers to make deposits in anticipation of membership, enrolling these teachers as members when they have accumulated in the retirement fund an amount equal to their back assessments with interest?

1. G. L., c. 32, § 7, par. (3), provides as follows: —

Any teacher who entered the service of the public schools before July first, nineteen hundred and fourteen, who has not become a member of the association, may hereafter, before attaining the age of seventy, upon written application to the board, become a member of the association by paying an amount equal to the total assessments, together with regular interest thereon, which he would have paid if he had joined the association on September thirtieth, nineteen hundred and fourteen.

G. L., c. 32, § 8, par. (2), provides:

The board may make by-laws and regulations consistent with law.

At a meeting of the Retirement Board held on October 8, 1919, the board adopted the following rule: —

Any teacher joining the Retirement Association under the provisions of paragraph (3) of section 7 of the retirement law, may pay his back assessments with interest in equal monthly instalments for a period of not exceeding five years. The monthly instalments shall not be less than the regular monthly assessment, and they shall be deducted from the salary of the member by the employing school committee as directed by the Retirement Board. The teacher may at any time make additional payments reducing the balance due the annuity fund. Interest on the balance due after each payment is made shall be figured at the rate of 4% per annum and shall be paid within three months from the date of payment of the last instalment.

To be valid and effective this rule must, in the language of the statute, be "consistent with law." The statute [G. L., c. 32, § 7, par. (3)] defines the only terms upon which teachers who served in the public schools of Massachusetts prior to July 1, 1914, are permitted to become members of the State Teachers' Retirement Association at any time before attaining the age of seventy. Under this statute such membership can only be acquired by making written application to the board and "by paying an amount equal to the total assessments, together with regular interest thereon," which the applicant would have paid if he had joined the association on September 30, 1914. These requirements are conditions precedent to membership, and there is nothing in the statute which permits an applicant to make such payments in instalments, nor does the statute confer authority upon the Retirement Board to receive such payments from an applicant in instalments. Membership can only be acquired by paying the entire amount called for. Since the statute does not expressly confer the right to make and receive such assessments by instalments, it is to be presumed that no such right exists, and that it was the legislative intention to exclude such method of acquiring membership. It accordingly follows that the rule of the Retirement Board is not "consistent with law," and therefore is invalid.

2. The same reasons given in my answer to your first question govern in answering your second question. No

authority is granted by the statute creating the Retirement Board which permits it to receive deposits from applicants in anticipation of membership. It is obvious that many complicated situations would arise if the board should act as a depositary for such instalments. In the absence, therefore, of express authority conferring upon the Retirement Association this right, I am of the opinion that your second question must likewise be answered in the negative.

METROPOLITAN DISTRICT COMMISSION — JURISDICTION —
PRIVATE WAYS ADJOINING ROADS CONSTRUCTED BY THE
COMMISSION — RIGHTS OF OWNERS OF ABUTTING LAND
TO EGRESS AND INGRESS — REGULATION.

The Metropolitan District Commission has the power, as to roads laid out under G. L., c. 92, § 33, to prohibit the construction of private ways connecting with such roads by abutting owners.

The Commission has not the right to prohibit the construction of a private way reasonably necessary for access to the land of an abutting owner connecting with a boulevard or roadway laid out under the provisions of G. L., c. 92, § 35. If the owner of an abutting piece of land has been given by the Commonwealth, by deed, the right of free access to a "reservation" roadway or to a "boulevard," this right of free access cannot be limited by the Commission.

The Commission may make reasonable rules and regulations regulating the location of a private way which is to connect abutting land with a "reservation" roadway or "boulevard."

An abutting owner having a right of free access to a public way, not limited by the terms of a deed, is entitled to a connecting way for all purposes for which he may lawfully use his land.

A regulation restricting the use of such a private way, so as to interfere with any purpose for which the land of the abutting owner might lawfully be used, is not a reasonable regulation.

You have requested my opinion relative to the jurisdiction of your Commission over the construction of private ways for the egress and ingress of owners of land adjoining roads constructed by your Commission.

There are two classes of roads which may be constructed under the terms of our statutes by your Commission. The first of these consists of roads constructed under the provisions of G. L., c. 92, § 33, formerly St. 1893, c. 407, and

To the Metro-
politan District
Commission.
1923
September 19.

consists, in general, of roads laid out upon or bordering upon spaces taken by the Commission for exercise and recreation. In the absence of particular facts relative to any one of such roads, these roads may fairly be said not to be public ways (*Gero v. Metropolitan Park Commission*, 232 Mass. 389); and in the absence of an easement given by the Commonwealth to some adjoining landowner, the adjoining landowner will not have any right of way from his land to such road.

The second class of roads over which this Commission has jurisdiction are those constructed under G. L., c. 92, § 35, formerly St. 1894, c. 288, commonly called "boulevards," which are constructed for the particular purpose of connecting various parts of the park system with towns in which any of the parks are situated. As to these boulevards the Commission is given the same powers which it has in regard to reservations, and additional powers such as those exercised by other public bodies over public ways. These boulevards constructed under section 35 are public ways. *Whitney v. Commonwealth*, 190 Mass. 531.

It is a settled principle of our law that abutting owners have a right of way for reasonable needs from their lands to the public way adjoining. The abutting owner's right of access to and from the public way is as much his property as his right to the soil within his boundary lines. With regard, therefore, to owners of land abutting on the roads called "boulevards," made under section 35, your Commission has not the power to prevent the construction by the abutting landowners of ways leading from their land to such boulevards. If at any time easements granting such right of connection with the highway to the owners of abutting lands have been given by easements in deeds from the Commonwealth, the rights of the abutting owners are additionally confirmed thereby.

Although the Commission has not the power to prohibit the exercise by the abutting owner of his right of access to and from a public way constructed under section 35, yet

it has the power to regulate the manner in which he shall use his right of access.

By G. L., c. 92, § 37, the Commission has authority to "make rules and regulations for the government and use of reservations or boulevards under its care." The right of the abutting owner is subject to this general provision for the regulation of the roads under the control of your Commission. Your Commission may make *reasonable* regulations concerning the location, construction and maintenance of such private ways as may be built by the abutting owners, as far as relates to their connection with the public ways. Conditions change from time to time, and what may be a *reasonable* regulation at one period may not be considered reasonable at another. There is wide latitude for the discretion of the Commission in this respect, but there is, in general, a right to make reasonable regulations as to the location of the private way with a view to the safety of the public traveling on the public way.

To summarize: Your Commission has the power, as to roads laid out under G. L., c. 92, § 33, to prohibit the construction of private ways connecting with such roads by abutting owners. Your Commission has not the right to prohibit the construction of a private way reasonably necessary for access to the land of an abutting owner connecting with a boulevard or roadway laid out under the provisions of G. L., c. 92, § 35. If by deed the owner of an abutting piece of land has been given by the Commonwealth the right of free access to a "reservation" roadway or to a boulevard," this right of free access cannot be limited by the Commission; but if the terms of the Commonwealth's deed do not give the right to construct more than one connecting way, the Commission, by its reasonable rules and regulations, may regulate the location of the private way which is to connect the abutting land. The abutting owner on a "boulevard" or the owner having a right of free access to such public way, unlimited by the terms of a deed, is entitled to a connecting way for all purposes for

which he may lawfully use his land in the situation in which it is, and a regulation restricting the use of such private way, so as to interfere with any purpose for which the land of the abutting owner might lawfully be used, would not be a reasonable regulation.

GREAT PONDS — TITLE — CONTROL — PUBLIC RIGHTS —
ACCESS — FISHING — PRESCRIPTIVE RIGHTS — COLO-
NIAL ORDINANCE OF 1641-1647.

Great ponds are ponds containing in their natural state more than ten acres.

Title to great ponds, not granted to towns or appropriated to private persons prior to 1647, is in the Commonwealth for the benefit of the public.

Public rights in great ponds are not limited to those mentioned in the Colonial Ordinance: such ponds are devoted to such public uses as the progress of civilization and the increasing wants of the community properly demand.

Except during the period from 1835 to 1867, prescriptive rights in great ponds could not be acquired against the Commonwealth.

The Commonwealth and the public may acquire prescriptive rights in ponds privately owned.

Control of great ponds is in the Legislature.

There is now no public right to fish in certain great ponds containing twenty acres or less.

Other public rights are not affected by the statute relative to fishing.

The public has a right to reasonable means of access to ponds containing more than twenty acres, for the purpose of fishing.

The public, to gain access to great ponds for the purpose of fowling, and possibly for some other rights, where there are no public lands, roads or rights of way, may pass and repass on foot over unimproved and unenclosed lands.

To the Com-
missioner of
Conservation.
1923
October 1.

You have requested my opinion relative to certain public rights in great ponds.

The foundation of public rights in great ponds lies in the Colonial Ordinance of 1641-1647 (see Ancient Charters, 148; Body of Liberties, sec. 16; edition of the colony laws of 1660), which provides: —

SEC. 2. Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town, or the general court, have otherwise appropriated them: provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres

of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed.

The which clearly to determine; SECT. 3. It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, of the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks, or coves, to other men's houses or lands.

SECT. 4. And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow.

By this ordinance great ponds were defined as ponds containing more than ten acres, created by the natural formation of the land at a particular place, and were set apart and devoted to the public use. *West Roxbury v. Stoddard*, 7 Allen, 158; *Commonwealth v. Tiffany*, 119 Mass. 300; *Attorney General v. Herrick*, 190 Mass. 307; *Sprague v. Minon*, 202 Mass. 467, 468. The fact that the area of a great pond has been increased by a dam or by other artificial means does not change its character as a great pond. The test is the area covered by the pond in its earlier, natural condition. *Commonwealth v. Tiffany*, 119 Mass. 300.

Title to great ponds, both to the waters and to the soil underneath, which had not before the year 1647 been granted to a town or been appropriated to private persons, is in the Commonwealth for the benefit of the public, and if a pond had before that date been granted to a town and had not passed to a private person, the legal title remains in the town but the beneficial right is in the public. *Commonwealth v. Roxbury*, 9 Gray, 451; *West Roxbury v. Stoddard*, 7 Allen, 158; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548; *Attorney General v. Revere Copper Co.*, 152 Mass. 444.

Though fishing and fowling are the only public rights enumerated in the Colonial Ordinance, the mention of them did not exclude other rights, and the uses which the public

might make of great ponds not appropriated to private persons prior to 1647 were not limited to those named in the ordinance or in the Body of Liberties, or to such as could be made of them at the time. The great ponds, like any other property, can be applied to such uses as from time to time they become capable of. They are appropriated to such public uses as the progress of civilization and the increasing wants of the community properly demand. Fishing, fowling, boating, bathing, skating or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are public rights which are free to all persons so far as they do not interfere with the reasonable use of the ponds by others or with the public right, except in cases where the Legislature has otherwise directed. *West Roxbury v. Stoddard*, 7 Allen, 158, 171; *Hittinger v. Eames*, 121 Mass. 539; *Slater v. Gunn*, 170 Mass. 509, 514; *Attorney General v. Herrick*, 190 Mass. 307; *Buller v. Attorney General*, 195 Mass. 79, 83.

The public rights are common to all, and the permission to "householders," in the Colonial Ordinance, never has been construed as a prohibition to those who were not householders. *Slater v. Gunn*, 170 Mass. 509, 514. An unreasonable use of great ponds, not authorized by the Legislature, which is an interference with their reasonable use by the public, is a public wrong for which an indictment or information would lie. *Potter v. Howe*, 141 Mass. 357, 360. The littoral proprietors of land upon great ponds which had not been appropriated to private use have no peculiar rights in the waters or in the land under them, except by grant of the Legislature or by prescription from which a grant is to be implied. Subject to those exceptions, there are no private rights of property in great ponds. *Hittinger v. Eames*, 121 Mass. 539, 546; *Gage v. Steinkrauss*, 131 Mass. 222; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 557.

Prescription did not run against the king except by

statute, and this rule of common law prevailed in Massachusetts until the enactment of the Revised Statutes in 1835, chapter 119, section 12. Under that statute a title by disseizin could be acquired against the Commonwealth as readily as against a private person, and prescriptive rights in the real estate of the Commonwealth, including great ponds, could be acquired. But by St. 1867, c. 275, now G. L., c. 260, § 31, it was provided that the statute of limitations on real actions brought by the Commonwealth should not apply to "any property, right, title or interest of the commonwealth below high water mark or in the great ponds." Since the statute of 1867 the statute of limitations cannot be set up in bar of a real action brought by the Commonwealth to recover a great pond, unless the defendant had acquired a title by disseizin after the passage of the Revised Statutes in 1835, chapter 119, section 12, and prior to the enactment of St. 1867, c. 275. *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 452; *Sklaroff v. Commonwealth*, 236 Mass. 87, 88.

Both the Commonwealth and the public may, however, by prescription acquire rights in ponds which are privately owned, and rights of way to ponds, but the possession which operates such a result must be not only actual but open, adverse, exclusive and uninterrupted. *Coolidge v. Learned*, 8 Pick. 504; *Deerfield v. Connecticut River R.R.*, 144 Mass. 325; *Attorney General v. Abbott*, 154 Mass. 323, 328; *Attorney General v. Vineyard Grove Co.*, 181 Mass. 507; *Attorney General v. Ellis*, 198 Mass. 91, 98. If the use upon which the claim to a prescriptive right is based was with the permission, express or implied, of the successive owners of the land or pond, and was not adverse and under a claim of right, no rights by prescription are acquired. *Slater v. Gunn*, 170 Mass. 509, 511. If a right of way is claimed by dedication, it must be shown that there was an intention on the part of the owner to dedicate the roadway to the public, and an acceptance on the part of the public author-

ities. *Hayden v. Stone*, 112 Mass. 346, 350; *Commonwealth v. Coupe*, 128 Mass. 63; *Slater v. Gunn*, *supra*, p. 511.

The control of great ponds, in the public interest, is in the Legislature, which represents the public. It may regulate and change these public rights, or take them away altogether, to serve some paramount public interest. It may by a proper grant make them the subject of private property. *Commonwealth v. Alger*, 7 Cush. 53; *Hittinger v. Eames*, 121 Mass. 539; *Gage v. Steinkrauss*, 131 Mass. 222; *Sprague v. Minon*, 195 Mass. 581, 583; *Lynnfield v. Peabody*, 219 Mass. 322, 329.

In *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 555, the court said: —

These rights and powers, both the *jus privatum* and the *jus publicum*, to the extent to which they existed either in the king or Parliament, vested in the Colonial and Provincial government, and after the Revolution vested in the Commonwealth, including all the prerogatives and rights of the crown, and powers of regulation which had at any time previously been held and exercised by the government of England.

And at page 557 of that case the court said: —

The power of the Legislature to regulate the rights of fishing, and other public rights, is very broad. Thus it may regulate the time and manner of fishing in the sea within its limits, and may grant exclusive rights of fishing. Instances of the exercise of this power in regard to the great ponds are found in the various statutes leasing such ponds to individuals, which have been held to be valid, although they grant exclusive rights to individuals and exclude others from the exercise of rights to the use of the ponds to which they were before entitled. *Commonwealth v. Vincent*, 108 Mass. 441. *Commonwealth v. Tiffany*, 119 Mass. 300. *Cole v. Eastham*, 133 Mass. 65.

When the legislature grants certain rights it makes subordinate all other public rights which are inconsistent with the exercise of the rights granted. *Fay v. Salem & Danvers Aqueduct Co.*, 111 Mass. 27; *Attorney General v. Revere Copper Co.*, 152 Mass. 444; *Rockport v. Webster*, 174 Mass. 385; *Gardner Water Co. v. Gardner*, 185 Mass. 190, 194.

It is a well established rule that, in determining the scope and effect of such grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee and in favor of the grantor, reversing the common rule as between individuals. *Cleveland v. Norton*, 6 Cush. 380, 383; *Commonwealth v. Roxbury*, 9 Gray, 451, 492; *Martin v. Waddell*, 16 Pet. 367, 411.

Acting under this power, the Legislature restricted the public right of fishing in great ponds. G. L., c. 130, § 24 (formerly St. 1869, c. 384, § 8), provides: —

The fishery of a pond, the area of which is more than twenty acres, shall be public, except as hereinafter provided; and all persons shall, for the purpose of fishing, be allowed reasonable means of access thereto.

G. L., c. 130, § 32 (formerly St. 1869, c. 384, § 7, and R. L., c. 91, § 23), provides: —

The riparian proprietors of any pond, other than a great pond, and the proprietors of any pond or parts of a pond created by artificial flowing shall have exclusive control of the fisheries therein.

G. L., c. 130, § 33 (formerly St. 1869, c. 384, § 13, and R. L., c. 91, § 24), provides: —

A pond other than a great pond, bounded in part by land belonging to the commonwealth or to a county, city or town shall become the exclusive property of the other proprietors as to the fisheries therein only upon payment to the state treasurer, or county, city or town treasurer of a just compensation for their respective rights therein, to be determined . . . (in a prescribed manner).

St. 1869, c. 384, §§ 7 and 13, and R. L., c. 91, §§ 23 and 24, apply to “any pond the area of which is not more than twenty acres.” Though G. L., c. 130, §§ 32 and 33, seem to apply to any pond other than a great pond, they must be construed in the light of section 24 of that act and in the light of the previous enactments. So construed, these two sections apply to ponds which are not more than twenty acres in area. Were this not so and were it held that these

provisions apply only to ponds which are not great ponds, thereby meaning ponds ten acres or less in area, the provisions of these two sections would be of no effect, because the public, even in the absence of statutes, has no rights in ponds which are not great ponds. The effect of G. L., c. 130, §§ 24, 32 and 33, is to cut off the right of the public to fish in great ponds which are twenty acres or less in area where the pond is entirely surrounded by land of private riparian proprietors, and also in ponds twenty acres or less in area where the surrounding land is owned by individuals and the Commonwealth or a county, city or town, and compensation has been paid in accordance with the provisions of G. L., c. 130, § 33. See also IV Op. Atty. Gen. 639, 641. These sections do not diminish the fishing rights of the public in great ponds of more than twenty acres in area. Neither do they curtail other public rights in great ponds of less than twenty acres in area, nor in any way affect the conception of a great pond as one containing in its natural state more than ten acres. See G. L., c. 91, § 35.

G. L., c. 130, § 24, provides that, *for the purpose of fishing* all persons shall be allowed "reasonable means of access to ponds more than twenty acres in area." What constitutes "reasonable means of access" is a question of fact. The right to "reasonable means" was first granted by St. 1869, c. 384. Prior to that act the means of access to great ponds for the purpose of fishing was, and the right of access at the present time for the purpose of exercising other public rights, is, such as were granted by the Colonial Ordinance, which provided that the public "may pass and repass on foot through any man's propriety . . . so they trespass not upon any man's corn or meadow."

In *Commonwealth v. Alger*, 7 Cush. 53, 70, the court said:—

The word "propriety" is nearly, if not precisely, equivalent to "property." It imports not an easement, an incorporeal right, license, or privilege, but a *jus in re*, a real or proprietary title to, and interest in, the soil itself, in contra-distinction to a usufruct, or an uncertain and precarious interest.

In *Slater v. Gunn*, 170 Mass. 509, 512, the court said: —

The question whether the public may cross private lands and if so to what extent, for the purpose of gaining access to them, does not seem to have been passed upon, though there are various dicta in our decisions in regard to it which tend to show that the right of access is limited to cases where it can be exercised without trespassing on the lands of others. *Coolidge v. Williams*, 4 Mass. 140, 141. *West Roxbury v. Stoddard*, 7 Allen, 158, 171. *Paine v. Woods*, 108 Mass. 160, 173. *Rowell v. Doyle*, 131 Mass. 474.

At pages 514–516 the court said: —

At the time when the ordinances were adopted the territory to which they applied was almost wholly a wilderness. There naturally would be few public ways leading to great ponds. If there was any common land upon them it might be remote and inconvenient. The population was small and scattered. Many, if not most, of the ponds would be surrounded with wild lands. No harm would be done by permitting persons to cross these lands for the purpose of gaining access to the ponds for fishing and fowling, which were the uses for which they were principally resorted to. In view of all these circumstances, it was provided by the ordinance of 1649 that any man who desired to gain access to the ponds for these purposes should be free to “pass and repass on foot through any man’s propriety for that end, so they trespass not upon any man’s corn or meadow.” This, we think, was intended to limit the passing and repassing to unimproved and unenclosed lands lying on the ponds, and is to be construed with reference to the condition of things existing when the ordinance was adopted. It did not create a right of way over such lands on the part of the public, but relieved persons crossing them in the manner and for the purposes named from liability as trespassers, to the end that the public reservation should in no case altogether fail. If it is regarded as establishing a rule of property, the rule is not an inflexible and unvarying one, but it is to be applied with a due regard to existing conditions. As public means of access to the ponds multiply, and the land about the ponds becomes more valuable, it may well be held that a rule which was adapted to earlier and different conditions should suffer a corresponding modification in its application. In cases where there are no convenient means of access, fishermen and hunters, and possibly others, may still pass and repass on foot through wild lands lying upon them for the purpose of gaining access to great ponds. But it hardly could have been intended, we think, that as the uses of the ponds increased the right to cross and recross the unimproved and unenclosed lands lying upon them

should increase also, and that such land should be liable to be subjected to a constantly increasing burden. As the ponds became more valuable for the public use, and were resorted to more by the public, means of access naturally would be provided by the public authorities, and there would be less instead of more necessity for crossing private lands. . . . the Legislature has provided . . . that all persons shall be allowed reasonable means of access to great ponds of more than twenty acres for the purpose of fishing without rendering themselves liable as trespassers. . . . If it had been understood that under the ordinance the public had a right of access to great ponds over private lands, this legislation would have been unnecessary, except so far as it related to the size of the ponds.

The case of *Slater v. Gunn*, *supra*, appears to be the only case decided in Massachusetts which deals directly with the question of the means of access to great ponds. That case holds that "in cases where there are no convenient means of access, fishermen and hunters, and possibly others, may still pass and repass on foot through wild lands lying upon them, for the purpose of gaining access to great ponds."

I am accordingly of the opinion that the public, in order to gain access to great ponds for the purpose of exercising the right of fowling, and possibly some other rights which reasonably may be supposed to have been contemplated at the time of the adoption of the Colonial Ordinance, may, where there are no public lands or public roads or rights of way acquired by eminent domain, purchase, dedication or prescription, pass and repass on foot over unimproved and unenclosed lands without rendering themselves liable as trespassers. With respect to fishing in ponds of more than twenty acres, the public is by statute afforded a reasonable means of access. Where there are no means of access over unimproved and unenclosed lands and no public lands, public ways or acquired rights of way, persons may in a reasonable manner pass over other lands of proprietors bordering on such ponds, for the purpose of gaining access thereto for fishing, without rendering themselves liable as trespassers. The Commonwealth or any municipality may, of course, by eminent domain take sufficient land to lay out a public way to any great pond. Except for the

foregoing, the public has no right of access across private lands for the purpose of exercising public rights in great ponds.

To summarize:

(1) Great ponds are ponds created by the natural formation of the land at a particular place, containing, in their natural condition, more than ten acres.

(2) Title to great ponds which had not before the year 1647 been granted to a town or been appropriated to private persons is in the Commonwealth for the benefit of the public.

(3) Public rights in great ponds which are not appropriated to private persons are not limited to those mentioned in the Colonial Ordinance. Such ponds are devoted to such public uses as the progress of civilization and the increasing wants of the community properly demand.

(4) The public rights are common to all persons.

(5) Except during the period from 1835 to 1867, prescriptive rights in great ponds could not be acquired against the Commonwealth.

(6) The Commonwealth and the public may acquire prescriptive rights in ponds which are privately owned.

(7) The control of great ponds is in the Legislature, which may regulate and change the public rights or take them away altogether.

(8) There is now no public right to fish in ponds containing twenty acres or less, where such ponds are entirely surrounded by land of private riparian owners, or where the surrounding land is owned by private persons and the Commonwealth or a county, city or town, and compensation has been paid by the private owners in accordance with the statutory provisions.

(9) The other public rights in great ponds, whether more or less than twenty acres in area, are not affected by the statute relative to fishing and exist in full force, except as they have otherwise been restricted by the Legislature.

(10) In ponds containing more than twenty acres in area,

the public, in addition to such rights as it has in the pond itself, has a right to reasonable means of access to such ponds for the purpose of fishing.

(11) In exercising the foregoing right the public may, where there are no means of access over unimproved and unenclosed land and no public lands or public roads or rights of way, pass in a reasonable manner over other lands of proprietors bordering on such ponds.

(12) The public, in order to gain access to great ponds for the purpose of exercising the right of fowling, and possibly some other rights which reasonably may be supposed to have been contemplated at the time of the adoption of the Colonial Ordinance, may, where there are no public lands, public roads or rights of way, pass and repass on foot over unimproved and unenclosed lands without rendering themselves liable as trespassers.

COMMISSIONER OF PUBLIC WORKS — REGISTRAR OF
MOTOR VEHICLES — APPROVAL OF INCREASES IN
SALARIES OF MOTOR VEHICLE INVESTIGATORS.

The approval of the Commissioner of Public Works should follow the determination of increases in salaries of investigators and examiners appointed by the Registrar of Motor Vehicles before such increases are finally determined.

To the Com-
mission on Ad-
ministration
and Finance.
1923
October 25.

You have requested my opinion as to whether or not the approval of the Commissioner of Public Works is necessary in the matter of certain proposed increases in the salaries of motor vehicle investigators, which have been submitted to you by the Registrar of Motor Vehicles.

G. L., c. 16, § 4, provides as follows: —

The commissioner shall be the executive and administrative head of the department. He shall approve all contracts made by either division, and may require any of the expenditures of either division to be submitted to him for approval. He may appoint, assign to divisions, transfer and remove such officials and employees as the work of the department may require, and fix their compensations.

G. L., c. 90, § 29, reads as follows: —

The registrar shall appoint competent persons to act as investigators and examiners, may remove them for cause, and may determine their compensation and terms of service and define their duties. . . .

In order to arrive at a determination of your question, which is raised because of the apparent conflict between the two statutory provisions quoted above, it is necessary to examine the history and language of the statutes which created the Department of Public Works in its present form, and which passed on to the Registrar of Motor Vehicles the powers and duties of the former Massachusetts Highway Commission.

By adopting Mass. Const. Amend. LXVI the people of the State provided that —

On or before January first, nineteen hundred twenty-one, the executive and administrative work of the commonwealth shall be organized in not more than twenty departments, in one of which every executive and administrative office, board and commission, except those officers serving directly under the governor or the council, shall be placed. Such departments shall be under such supervision and regulation as the general court may from time to time prescribe by law.

Pursuant to this mandate, the General Court passed an act in 1919 to organize in departments the executive and administrative functions of the Commonwealth, and this act, sometimes referred to as the "consolidation act," was Gen. St. 1919, c. 350.

By section 111 the Massachusetts Highway Commission and the Commission on Waterways and Public Lands were abolished and were succeeded by the Department of Public Works. G. L., c. 16, § 1, the instant statute, provides: —

There shall be a department of public works, consisting of a division of highways and a division of waterways and public lands.

Section 2 provides for the appointment of a commissioner and four associates to supervise and control the department.

Section 3 provides that the Governor shall appoint two of the associate commissioners to have charge of the Division of Highways, and the other two to have charge of the Division of Waterways and Public Lands.

By virtue of this statute, which was originally enacted as Gen. St. 1919, c. 350, pt. III, the commission formerly known as the Massachusetts Highway Commission was merged in the new department, and, as the act of 1919 specifically stated, all its rights, duties, powers and obligations were transferred to and are to be exercised by the Department of Public Works. The provisions of G. L., c. 16, are merely a codification of the original act of 1919 creating such Department of Public Works. In like manner the provisions for the creation and appointment of a Registrar of Motor Vehicles, to be appointed by the Commissioner of Public Works, were first enacted in the same chapter, Gen. St. 1919, c. 350, and are there in the identical words of G. L., c. 16, § 4, except that the powers and duties of the Registrar are described and fixed in these words in section 115 of Gen. St. 1919, c. 350: —

The registrar of motor vehicles shall have, exercise and perform all the rights, powers, duties and obligations of the Massachusetts highway commission relative to motor vehicles and to the operation thereof, as defined by chapter five hundred and thirty-four of the acts of nineteen hundred and nine, and acts in amendment thereof and addition thereto. Any person aggrieved by a regulation, ruling or decision of said registrar may, within ten days thereafter, appeal . . . to the commissioners of the division of highways . . .

Provisions similar to those in the earlier act, for appeal from rulings and regulations made by the Registrar to the commissioners of the Division of Highways, appear in various sections of G. L., c. 90.

This same act which abolished the former jurisdiction of the Massachusetts Highway Commission over motor vehicles created the office of Registrar, created the Department of Public Works, gave the Commissioner of Public Works the power to fix the compensation of officials and

employees of the division, as well as to remove and to transfer from one division to another any of such employees (Gen. St. 1919, c. 350, § 114), and this in addition to the power given him to appoint and remove the Registrar. The Registrar, though given broad powers under the act of 1919, was subject to a review of his decisions by the new Division of Highways, as he still is under G. L., c. 90. His powers and duties are defined to be those of the former Massachusetts Highway Commission. Since the enactment of the statute of 1919 creating the Department of Public Works, the Registrar has been in practice treated as a subdivision of the Division of Highways.

If we seek to construe the law concerning the jurisdiction of the Commissioner of Public Works over the salaries of the employees of the Registrar, in view of the fact that the provisions relating thereto were originally all part of the same act, and not, as now, codified into separate chapters, we may more easily arrive at a determination of the legislative intention in framing the clauses under discussion.

The original act of 1919, which created both the Commissioner of Public Works and the Registrar, gave to the Registrar the powers of the former Highway Commission under St. 1909, c. 534, as amended by subsequent legislation. It is true that St. 1909, c. 534, gave to the Highway Commissioners the power to appoint and remove investigators and examiners and to fix their compensation in essentially the same language as is used in G. L., c. 90, § 29, and their fixation of compensation was not then reviewable by any other official, nor had it become so by later enactments. However, the very act which transferred their powers to the Registrar embodied within itself the creation of the new Department of Public Works, two new divisions and the new office of Registrar, all manifestly intended to be under the Commissioner's supervision as regards the expenditures of their offices and the compensation of their employees. It is obvious from an inspection of Gen. St. 1919, c. 350, pt. III, division 18, that the power to supervise salaries

was given to the Commissioner as to both the divisions of his department, and that the office of Registrar, also created by division 18, was not intended by the Legislature to be an office wholly separate and distinct from the newly created Department of Public Works, but was intended to be limited by the other provisions of division 18, and to be subject, in the exercise of powers relative to employees' salaries, to the general provision of the division of the statute, in section 115, giving to the Commissioner the general oversight of and right to approve all matters pertaining to the compensation of the employees of the various officials mentioned in division 18 of the statute.

While it is true that the former Massachusetts Highway Commission had the power to fix the compensation of their employees, nevertheless, in view of the fact that the act of 1919, which conferred their power upon the Registrar, created a supervisory official who had authority to oversee matters of compensation relative to employees, it seems that it is necessary to construe the act of 1919 as by its very terms withholding from the Registrar this particular power which the Highway Commission previously had, but which, under the intention of the new act, neither their successor, the Highway Division, nor the Waterways Division was to possess any longer. The fact that in process of codifying the laws the subject-matter of the act of 1919 was separated into two distinct chapters is responsible for the apparent conflict; but when read together, as they were originally written, the meaning and intent of the Legislature are plain.

To construe the statute as establishing one office, among all those created by the statute, which alone should be above the authority of the executive head with respect to salaries, would seem to subvert the manifest intention of the Legislature in passing this act, which was to centralize in the hands of one responsible official, the Commissioner, the ultimate authority over all the other officials and employees mentioned in this division of the statute, for the

purpose of bringing the whole group into harmony as respects salaries and duties, correlative to each other. The power of the Commissioner indicated in the act of 1919 in this respect is generally to be exercised by a power of change or veto over the acts of the subordinate executives, leaving them, as in the case of the Registrar, power of initial movement in the matter.

A study of the history of the enactment of the so-called "consolidation act" and its codification in the General Laws clearly indicates that it was the conception of both the joint committee on administration and commissions, which prepared the reorganization act, and the General Court, which enacted it, to secure centralization of responsibility. "What was required was a scheme for the establishment of better order in the administration of the affairs of the executive branch of the State government, leaving the correction of mistaken details to the future. Upon the Governor rests the duty to select the proper personnel, and upon the officials *he* appoints the duty to see that the machinery which the Legislature has provided is intelligently operated." A very thorough statement of the history of the consolidation act is to be found in the August, 1919, number of the Massachusetts Law Quarterly, at page 366, prepared by Fitz-Henry Smith, Jr., Esq., House chairman of the joint committee on administration and commissions, which prepared the reorganization bill.

In view of the foregoing, in my judgment, the approval of the Commissioner of Public Works should follow the determination of compensation of investigators and examiners appointed by the Registrar of Motor Vehicles.

In connection with this opinion I might add that it was clear to the Legislature that matters might arise, after the statute was placed upon the books, where certain provisions were in apparent conflict, and therefore it was provided by Gen. St. 1919, c. 350, § 10, that —

In all cases where a question arises between departments or officers or boards thereof as to their respective jurisdiction or powers, or where

departments, or officers or boards thereof, issue conflicting orders or make conflicting rules and regulations, the governor and council shall, on appeal of any such department or any person affected thereby, have jurisdiction to determine the question, and to order any such order, rule or regulation amended or annulled; *provided*, that nothing herein contained shall be construed to deprive any person of the right to pursue any other lawful remedy. The time within which such appeal may be taken shall be fixed by the governor and council.

In the codification this provision was changed to read as follows (G. L., c. 30, § 5): —

In all cases where a question arises between executive or administrative departments, or officers or boards thereof, as to their respective jurisdictions or powers, or where such departments, or officers or boards thereof, issue conflicting orders or make conflicting rules and regulations, the governor and council may, on appeal by any such department or by any person affected thereby, determine the question, and order any such order, rule or regulation amended or annulled; *provided*, that this section shall not deprive any person of the right to pursue any other lawful remedy. The time within which such appeal may be taken shall be fixed by the governor and council.

METROPOLITAN DISTRICT COMMISSION — LAND BORDERING ON MYSTIC LAKES — EASEMENT.

By a continuous uninterrupted user an easement by prescription has been acquired in land bordering on the Mystic Lakes for the maintenance of a structure used as a boat club, and a right of way thereto.

To the Metro-
politan District
Commission.
1923
October 27.

You have requested my opinion upon certain matters relative to land under the control of the Metropolitan District Commission bordering on the Mystic Lakes in Medford.

It appears from your letter that the city of Charlestown, by virtue of St. 1860, c. 217, entitled "An Act for supplying the city of Charlestown with pure water," in consideration of the payment of a certain sum of money, acquired from the owners of land bordering the upper Mystic Lake, and lying between the two lakes, an easement of flowing the land

of the owners by a certain dam, and an easement providing for a right of way over the land and the occupancy of the land, limited to a right of way and occupancy for the specific purposes of the said act, and a further right of way over another strip of the owner's land near by, limited so as to be "only for the purpose of enabling said city to make necessary repairs upon the said conduit (then upon said land or to be placed there), and to such acts as may be necessary for the preservation, examination and use and reconstruction thereof (that is, of the conduit), and for no other purposes whatever," — the words in parentheses not being in the indenture. The owners expressly retain in the indenture their own rights in the land and the lake for all purposes not in conflict with the Commonwealth's use, and their rights to use the pond for boating and other purposes. It was also provided in the indenture that if the grantee did not maintain the aqueduct for the purposes of the act, or if the aqueduct and the water works were discontinued or not maintained, then, that easement should cease and determine. The rights acquired under this indenture have vested in the Metropolitan District Commission by the operation of various subsequent statutes, and takings of these easements thereunder, and have been so vested since 1895. The mere fact that water from the lakes has not actually been used for some years for water supply purposes, and is not at the present time in a condition to be used, is not of itself such a discontinuance of the maintenance of the aqueduct and water works as would work an abandonment thereof so as to determine the easements.

The actual easements which vested in the Commission in 1895 were limited in their scope to the purposes of the act of 1860, and the repair and general maintenance of the conduit referred to in the indenture. The purposes for which land might be taken and held were described by the act. The city of Boston was authorized to "take and hold by purchase, or otherwise, lands and real estate necessary for the erecting, laying and maintaining, and may erect,

lay and maintain, such aqueducts, pipes, reservoirs, embankments, water-ways, drains or other structures as may be necessary or convenient to convey said water into, and for the use of, the said city of Charlestown." And the general purpose of the act was described as being "the supplying of the city of Charlestown with pure water." In other words, the easements acquired under the indenture could be used only for purposes connected with supplying water for Charlestown.

The grantee of the easements, and its successors, did not acquire any right, as against the owner of the fee, to erect or maintain structures for purposes unconnected with supplying water to Charlestown. It did not acquire by the indenture the right to maintain or to permit others to maintain a structure for use as a boat club on the land or in the lake, or to occupy the land or lake for boating, nor did it acquire by the indenture any right of way over the lands for itself or for others, to pass and repass to a structure maintained as a boat club, or for any other purpose unconnected with the use of the lake as a source of water supply. It did not acquire under the indenture any right to park automobiles, or to permit others so to do, on the lands, except in necessary connection with the maintenance of the water supply.

It follows, then, that in 1900 the Commission did not have such an easement under the indenture that they could use any building on the land for boating or permit others to use such a building for such a purpose. I assume, from the facts stated in your letter, that the use made of the structure, of the land and of the pond and of the right of way, for the purposes of the boat club, was without the permission of the owner of the fee at all times subsequent to 1900. If the fact be otherwise, and these uses were permissive, and not, as your letter indicates, adverse to the owner of the servient tenement, the Commission and the Commonwealth are in no better position than they were in 1900. Assuming the uses to have been adverse, then the

owners of the fee could have prevented, by a resort to equity, the exercise by the licensees of the permission given to them by the Commission in its letter of 1900, and could have prevented the remodeling and use of the building by the Commission's licensees under the permission given in the letters of the Commission of May 18, 1900, May 4, 1904, and March 7, 1907, and might have prohibited the passage of automobiles and their parking upon the lands, as was subsequently the usage after the letters of the Commission of May 4, 1904, and March 7, 1907, and the vote of the Commission of September 29, 1920. All the acts which were then done relative to the boat club, and the use of the land by automobiles going to and from the boat club, were plainly in excess of any easement which had been acquired over the servient tenement, were adverse to the owner of the fee, and were not within the rights vested in the Commission by the indenture or the subsequent taking. The Commission could not itself so use the land, nor could it give or transfer to any licensee any right so to use the land.

The use made of the land for the purpose of maintaining a boat club, beginning with the year 1900, was open and continuous. Such use as was made at that time by the permission of the Commission of a right of way over the land for the purposes of the boat club was also open, and has been continuous and, in the same manner, adverse to the owner of the fee. I am of the opinion that, since these uses have continued uninterrupted by the owner of the fee during the period since 1900, the Commonwealth or the boat club, or both, have acquired an easement by prescription, as against the owner of the fee, to use the land and the pond and to maintain a structure for the purposes of a boating club, and to pass and repass over the land for purposes of access to the boat club, to the general extent which such passing was practiced in 1900. *Attorney General v. Ellis*, 198 Mass. 91. If any use of the land or passage over the land has been made within the past twenty years which has imposed a materially different or heavier burden

upon the servient tenement than did the usages in practice twenty years ago, such materially different or heavier usage has not yet given rise to any prescriptive right, and the Commonwealth and its licensees are continuing such usage adversely to the owner of the fee, and, under the terms of the indenture, the owner of the fee may prohibit them.

Whether or not the Commonwealth has, as against the owners of the fee, acquired easements in the land, the Commission has authority, as a commission, to permit the use of the lands for any lawful purpose not necessarily inconsistent with the maintenance of the aqueduct, the water works and the existence of the lakes as a possible water supply, subject to its determination by the owner of the fee if such use exceed any easement in such lands which the Commonwealth has acquired by actual grant or by prescription.

The fact that a greater use of the servient tenement is made than is authorized by the easement, unless necessarily destructive of the character of the easement itself, does not determine or lessen the easement which was originally actually granted. The excessive use may be prohibited by injunction by the owner of the fee, but the excessive use will not destroy the easement as originally granted. *Mendell v. Delano*, 7 Met. 176; *Cowell v. Thayer*, 5 Met. 253; *Roby v. New York Central R.R.*, 142 N. Y. 176. The adverse user described in your letter does not appear to have been of a character which would affect the existence of the easement which was originally granted by the indenture.

The propositions above set forth answer the first two questions in your letter to this department.

Your third question is: "If the Commission has authority to continue the present use by the boat club, can it accept such a bond as is suggested?" (That is, a bond from the boat club, which occupies a portion of the land under a license so to occupy from the Commission, to indemnify the Commission or the Commonwealth for any liability on the part of the Commission or the Commonwealth to

persons passing or repassing over the lands in question for the purpose of using the boat club.)

You do not state in your letter whether any road has been laid out on the existing embankment or elsewhere by the Commission, giving access to the boat club or to the land. It is impossible for this department, therefore, to determine what, if any, liability would rest upon the Commission or the Commonwealth relative to persons driving along the embankment to which you refer in your letter. If no way has been laid out by the Commission, it is highly improbable that there would be any liability to persons entering upon the land to go to the boat club. If the Commission has laid out a highway, liability would be governed by the provisions of G. L., c. 81, § 18, and there would be no liability on the part of the Commission or the Commonwealth for injury due to the absence of a railing. The taking of a bond of indemnity from the Commission's licensee could not, in any event, be an admission of any duty or liability upon the part of the Commonwealth; and, as a protection from expense of litigation, as well as more serious obligations, if any there be, the acceptance of an indemnity bond from the boat club would seem to be within the authority of the Commission.

If, however, in the opinion of the Commission the way in question, whatever its character may be, is not safe for the use of automobiles without a railing, the acceptance of a bond, without insistence upon the erection of such a railing by the Commission's licensee, although relieving against possible liability on the part of the Commission or the Commonwealth, does not tend to ensure the safety of the public traveling over such way.

CERTIFIED MILK — FOREIGN SUPERVISION — MEDICAL
MILK COMMISSIONS.

Certification of milk by a foreign corporation or board is not a sufficient compliance with the requirements of G. L., c. 180, §§ 20-25, as amended.

To the Com-
missioner of
Public Health.
1923
November 1.

You request my opinion as to whether or not a certain proposed plan for the certification of milk complies with the provisions of G. L., c. 180, §§ 20-25, as amended.

You state that it has been suggested to you that a certain citizen of New Hampshire be permitted to sell "certified milk" in Boston. It is said that "the milk is supervised by the Cheshire County Medical Commission" (not a Massachusetts corporation), and it is apparently proposed that this milk should be sold in Boston under a certification made by this foreign commission and "approved by the Boston Medical Milk Commission." Whether it is intended that the Boston Medical Milk Commission shall also certify the milk is not plain from your communication, but unless they did so certify it themselves its sale as "certified milk" would be unlawful in any event.

G. L., c. 180, §§ 20 and 21, provide for the creation of corporations composed of physicians and members of boards of health, to be known as medical milk commissions, and the purpose of such bodies is said by the statute to be: "for the purpose of supervising the production of milk." By section 23, as amended by St. 1923, c. 252, such corporations may enter into written agreements with dairymen for the production of milk under their supervision, of at least a minimum prescribed standard, under conditions prescribed by the corporations. The conditions prescribed are to be approved by the Department of Public Health. By section 24 the working methods of the corporations and the dairies with which they make contracts are to be subject to investigation by the department. The corporations may certify milk produced under their supervision, which may be sold as "certified milk," so called.

It is not the intent of the statute that milk certified by

a foreign corporation, not subject to the provisions of chapter 180, should be sold in this State as "certified milk," nor is it the intent of the statute that the corporations formed under its provisions should act merely as registrants of the acts of a foreign commission. The intent of the statute is that milk of the quality known as "certified" should be produced under the supervision of these Massachusetts corporations, called medical milk commissions, through contracts made by them with dairymen, which prescribe the particular conditions under which the milk should be produced, these conditions to have the approval of the Department of Public Health of this State.

To permit these medical milk commissions to forego the making of contracts with dairymen for the production of milk under conditions approved by the State Department of Health, and in lieu thereof to accept a certificate of the quality of the milk made by officials of another State, would be entirely contrary to the purpose and intent of the statute. The commissions cannot substitute for their own supervision and regulation of the dairies which are the source of their milk supply the supervision of a commission of another State.

I am of the opinion that the proposed plan for certification of milk does not conform to the statutory requirements.

PRISONERS — STATE PRISON — SUCCESSIVE SENTENCES.

A second sentence of a person serving a sentence at the State prison begins to run upon the expiration of the minimum term of the first sentence.

The first sentence of such prisoner is not terminated by the taking effect of the second sentence.

After the second sentence of such prisoner takes effect, both sentences run concurrently.

You state that a man was sentenced to the State prison on December 16, 1920, to serve not more than five and not less than three years; that he escaped from the prison on May 11, 1921, and was returned thereto on September

To the Com-
missioner of
Correction.
1923
November 10.

11, 1921; that for the crime of escape he was sentenced to the State prison for not more than one and one-half years and not less than one year, said sentence to take effect from and after the expiration of his first sentence. You request my opinion upon the following questions: —

1. Assuming that no parole is granted to the prisoner, and assuming that he has not been punished or broken the rules of the prison, upon what day would he be entitled to release upon these two sentences?

2. Assuming no parole is granted him on the first sentence, upon what day will the second sentence begin to run? In other words, is the 4-months' period which he spent outside the prison automatically deducted from his term?

G. L., c. 279, § 24, provides, in part: —

If a convict sentenced to the state prison receives an additional sentence thereto, it shall take effect upon the expiration of the minimum term of the preceding sentence.

This second sentence, accordingly, will begin to run upon the expiration of the minimum term of the first sentence.

The convict was at large for four months, and this period should manifestly not be considered as time served under his sentence. The minimum term of his first sentence will therefore expire three years and four months after December 16, 1920, and his second term will then begin to run.

The first sentence is not, however, in my opinion, terminated by the taking effect of the second. The convict is under sentence during the whole of the maximum term of the first sentence. A sentence for a minimum and maximum term is, in effect, a sentence for the maximum fixed by the court. *Commonwealth v. Brown*, 167 Mass. 144, 146; *Oliver v. Oliver*, 169 Mass. 592, 594; *Ex parte Spencer*, 228 U. S. 652, 661; *Adams v. Russell*, 229 U. S. 353, 368. It necessarily follows that after the second sentence takes effect both sentences run concurrently.

The maximum period of time during which the prisoner may be confined under both sentences is five years, since

his second sentence will have completely expired before the maximum of his first sentence expires. Assuming that no parole is granted to him, and assuming that he has not been punished or broken the rules of the prison, he is entitled, under the provisions of G. L., c. 127, § 133, to a permit to be at liberty upon such terms and conditions as the Board of Parole may prescribe when he has served four years. If the record shows that he has violated the rules of the prison, he is not entitled to be released until he has served five years.

CONSTRUCTION OF ST. 1922, c. 462 — DIRECTORY OR MANDATORY.

A statute directing a public official to do a certain act within a certain time is generally construed as being directory rather than mandatory, and not as limiting his authority to do the act after the expiration of the time.

St. 1922, c. 462, directing the Division of Waterways and Public Lands to determine the location where it is advisable to build a public terminal for the Cape Cod Canal, and authorizing the Division thereafter to build such terminal, does not require the Division to determine the location within definite limits of time.

You ask me to advise you with reference to St. 1922, c. 462, if, in my opinion, the Division of Waterways and Public Lands is required, within definite limits of time, to determine the location along the line of the Cape Cod Canal or elsewhere in the town of Bourne or Sandwich, where, in its opinion, it is advisable to build a public terminal.

St. 1922, c. 462, is, in part, as follows: —

SECTION 1. The division of waterways and public lands of the department of public works, hereinafter called the division, is hereby authorized and directed to determine, after public hearings to be held in one or more places in each of the counties of Barnstable and Plymouth, and after such examination as it may deem necessary, the location along the line of the Cape Cod canal or elsewhere in the town of Bourne or Sandwich, where, in its opinion, it is advisable to build a public terminal which shall include a pier and approaches, and such equipment, appliances and rail connections as it deems necessary, and to do such other work as may be necessary and advisable to carry out the purposes of this act.

To the Com-
missioner of
Public Works.
1923
November 20.

SECTION 2. When the location of the proposed terminal has been so determined, the division may purchase, or take by eminent domain under chapter seventy-nine of the General Laws, such lands and flats and rights and interests therein as may be necessary, and may build such terminal; provided however, that no expense shall be incurred until contributions towards the cost of said terminal amounting to seventy-five thousand dollars have been made by the counties of Barnstable and Plymouth and paid into the state treasury. . . . The division may expend the total sum so contributed, together with a further sum, not exceeding seventy-five thousand dollars, out of the annual appropriation or appropriations for the improvement of rivers and harbors, when such sum and the total sum contributed as aforesaid are made available for the purposes of this act.

.

In effect the statute authorizes and directs the Division to determine, after public hearings and examination, the location along the line of the Cape Cod Canal or elsewhere in the town of Bourne or Sandwich, where, in its opinion, it is advisable to build a public terminal; and further provides that when the location of the proposed terminal has been so determined the Division *may* purchase or take by eminent domain such lands and interests therein as may be necessary, and *may* build such terminal; but shall incur no expense until contributions towards its cost have been made by the counties of Barnstable and Plymouth. No definite time is stated in the act when the determination shall be made.

A statute authorizing and directing a public official to do a certain act within a certain time is generally construed as being directory rather than mandatory, and not as limiting his authority to do the act after the expiration of the time. *Pond v. Negus*, 3 Mass. 230, 232; *Clemens Electrical Mfg. Co. v. Walton*, 168 Mass. 304, 307, 308; *Rutter v. White*, 204 Mass. 59, 61, 62. The cases also sometimes go further in interpreting a positive direction, in the light of the statute as a whole, as importing only power or authority. The word "shall," used in that connection, has been construed to mean "may." *Suburban Light &*

Power Co. v. Boston, 153 Mass. 200, 202; *Rea v. Aldermen of Everett*, 217 Mass. 427; *Ashley v. Three Justices of Superior Court*, 228 Mass. 63, 69, 70.

The act does not direct the Division to proceed with the construction of the terminal at any time. You will note that section 1 provides that the Division is to determine the location, after public hearings, and "after such examination as it may deem necessary." This language clearly indicates that it is within the Division's discretion as to how extensive an examination shall be made. You are not limited as to time. Further, if your Division should determine that for a proper examination certain expenses should be incurred, you are precluded from proceeding until contributions have been made by the counties of Barnstable and Plymouth and paid into the State treasury. This is a condition precedent to your incurring expense. This is, of course, collateral to your main question, which has been answered above to the effect that your Division is not required to determine the location within definite limits of time.

DEPARTMENT OF PUBLIC HEALTH — ABERJONA RIVER — REGULATIONS — SEWAGE.

The word "sewage" as used in St. 1911, c. 291, includes filth from manufactories as well as from dwellings.

The Department of Public Health may prevent the discharge of sewage into the Aberjona River and its tributaries as well as the creation of a nuisance therein.

You have asked my opinion relative to several matters connected with drainage into the Aberjona River and its tributaries.

Your first question is as follows: — "Is the word *sewage* in chapter 291, Acts of 1911, to be interpreted to include all manufacturing filth or refuse, even if free from human excreta or household wastes?"

I am of the opinion that the word "sewage" in the statute under consideration is not limited to household wastes and

To the Com-
missioner of
Public Health.
1923
November 27.

human excreta, but includes filth and refuse from manufacturing as well as from dwellings.

No precise definition of the word "sewage," applicable to all conditions, is given in the decisions of our Supreme Court or in the statutes. The connotation of the word varies with regard to the context of the particular act under consideration, but it is not in any event limited so as to apply only to what is sometimes called "house slops." As used in the present statute the essential character of the thing designated as sewage is that it is something carried into the river through a sewer. The entrance into the river of other noxious substances which might be carried by flow, percolation or surface drainage into the stream is taken care of by the last clause of the section. The word "sewage" has been defined in various decisions along these general lines: —

The refuse and foul matter, solid or liquid, carried through a sewer by the water flowing therein. (*Wendell v. Waukesa*, 110 Wis. 101.)

The refuse and foul matter, solid or liquid, which a sewer carries off. (*Morgan v. Danbury*, 67 Conn. 484.)

The matter which passes through sewers; excreted and waste matter, solid and liquid, carried off in sewers. (Century Dictionary.)

Sewerage is a system of drainage by means of sewers, and sewage is sometimes used to denote the water flowing in or carried off by sewers and sometimes the system of sewers for carrying off filth or superfluous water. (*Wilson v. Chicago Sanitary Dist.*, 133 Ill. 443.)

Excrement, waste stuff or dye material washed into a river by the surface drainage and not conducted there by a system of pipes is not sewage. (*Durham v. Eno Mills*, 144 N. C. 705.)

Your second question is as follows: — "In the opinion of the Attorney General is St. 1911, c. 291, to be interpreted to mean that the department is to prohibit the discharge of sewage into the Aberjona River or its tributaries, even though the quantity of sewage now being discharged into said river or tributaries is insufficient to create a nuisance or cause injury to the public health?"

Under the act in question your department has the power

to prevent the discharge of any sewage into the Aberjona River.

Your third question is as follows: — “Is it the duty of the department to prohibit the discharge of both sewage and manufacturing wastes into the Aberjona River or its tributaries, even though neither sewage nor such waste is now being discharged there in such quantities as to cause the condition of the river to be injurious to public health or to create a public nuisance?”

As I have said in my answer to your second inquiry, your department has the power to prohibit the discharge of any sewage into the river. It also has the power to prohibit the discharge into the river of any substance which cannot be said to be included in the term “sewage” and which is or may be injurious to public health or creates or has a tendency to create a public nuisance. In regard to these substances other than sewage, the department’s power to prohibit their entrance into the river exists only if they may reasonably be said to create or to be likely to create the conditions mentioned, that is, injury to public health or formation of a public nuisance.

As regards sewage, no previous determination of the department as to the conditions which may be created by the sewage is necessary. I am of the opinion, however, that it is left to the discretion of the department to exercise its power of prohibition, both as to sewage and as to other substances, in a reasonable manner, with due regard to the public welfare. The department is not required by the terms of the act to prohibit the entrance of all sewage. It is its duty, however, to prohibit the entrance of any sewage which it finds injurious or likely to be injurious to the public. It is its duty to deal with “other substances” in like manner, and it may prohibit the entrance of sewage altogether.

That the words “authorized and directed,” as used by the Legislature in this statute, are not, strictly speaking, mandatory, but do so far compel the department to action

that it cannot arbitrarily or capriciously refuse to act, but is permitted to use a wise discretion as to when it shall proceed to prohibit, seems to be indicated by the provisions of section 2, which directs the department to use persuasion and advice as a means of remedying pollution which may be occurring or likely to occur. Whether the department should or should not exercise its authority to prohibit discharges into the river in any particular instance depends upon a determination of the facts relative thereto and an application of the principles of law suggested.

Upon the questions of fact involved this office cannot pass. It is for the department to say whether the public interest requires it to act to prohibit the discharge of sewage or other substances into the river. In the absence of any injury to the public or individuals, or the likelihood of any such injury arising from a given set of conditions, it would not appear to be obligatory on the department to take any steps under the provisions of the act.

Your fourth question is as follows: — "Can the department, in case it should find that a nuisance exists in a tributary stream which disappears before reaching the main stream, prohibit the entrance or discharge of sewage, etc., into the tributary only, or must any order under this act cover the entire stream and its tributaries?"

In my opinion, the provisions of the act under consideration permit the department, in the reasonable exercise of its discretion, to prohibit the discharge of sewage into the river or into any of its tributaries, as such, and the prohibition may be enforced as to the whole river system or as to any of its parts.

LICENSE TO MAINTAIN GARAGE AND KEEP GASOLINE —
 LICENSE COMMISSIONERS OF CAMBRIDGE — STATE
 FIRE MARSHAL — COMMISSIONER OF PUBLIC SAFETY
 — RIGHT OF APPEAL — MATTERS FOR CONSIDERATION.

Under G. L., c. 148, § 45, an appeal lies to the State Fire Marshal from a decision of the board of license commissioners of Cambridge in granting a license to conduct or maintain a garage of the first class and to keep inflammable liquid in connection therewith, and, under G. L., c. 147, § 5, to the Commissioner of Public Safety from a decision of the State Fire Marshal confirming such grant.

The State Fire Marshal and the Commissioner of Public Safety, in making decisions on such appeals, have the right to consider not only fire hazard but the inconvenience and annoyance of persons affected and the general good order and welfare of the community.

You have requested my opinion on three questions of law arising out of the following situation: —

To the Com-
 missioner of
 Public Safety.
 1923
 November 28.

On May 23, 1923, _____, _____ Street, Cambridge, petitioned the board of license commissioners of Cambridge for a license to conduct or maintain a garage of the first class for eight cars additional, and keeping or storing volatile inflammable liquid in connection therewith in tanks of cars only.

After due notice and hearing held on June 19, 1923, said license was granted.

On August 9, 1923, appeal was made to the State Fire Marshal, requesting that the State Fire Marshal give a hearing in the case. On August 20, 1923, the State Fire Marshal granted a hearing and made the following decision:

"The decision of the Board of License Commissioners granting a license to conduct or maintain a garage of the first class for eight cars and to keep volatile inflammable liquid in connection therewith, in tanks of cars only, at No. _____ Street, in the city of Cambridge, is hereby confirmed."

An appeal from the decision of the State Fire Marshal to the Commissioner of Public Safety was taken, and on October 29, 1923, the Commissioner of Public Safety granted a hearing on this appeal.

Your first question is: Does a right of appeal lie from the board of license commissioners of Cambridge to the State Fire Marshal?

The answer is "Yes." G. L., c. 148, § 45, specifically provides for such an appeal.

Your second question is: Does an appeal lie from the State Fire Marshal's decision to the Commissioner of Public Safety?

The answer to this question is also in the affirmative. See G. L., c. 147, § 5; also, V Op. Atty. Gen. 718.

Your third question is as follows: What facts can legally be considered by the State Fire Marshal and the Commissioner of Public Safety in arriving at a decision on this case? Should this opinion be based entirely on the fire hazard or may any and all facts relative to such matter, and which might rightfully be considered by the board of license commissioners of Cambridge, be considered by the Fire Marshal and the Commissioner of Public Safety in arriving at a decision?

First, it is to be pointed out that the powers of the State Fire Marshal and, in turn, the Commissioner are not affected by Spec. St. 1919, c. 83, or St. 1922, c. 95, as both acts specifically provided that "nothing herein contained shall affect the authority of the state fire marshal." For the purposes of this decision, St. 1894, c. 399, contained practically the same provisions as are now found in G. L., c. 148, § 14, which section provides, in brief, that no building shall be used for the keeping, storage, etc., of inflammable articles unless licensed. In construing this act the Supreme Judicial Court, in the case of *Commonwealth v. Packard*, 185 Mass. 64, 67, held that the tribunal designated to pass upon and determine whether a license should be issued might give due consideration to those who might be inconvenienced and annoyed, and also have a proper regard for the general good order and welfare of the community. While G. L., c. 148, § 14, applies outside of the metropolitan fire prevention district, yet by section 30 the Marshal is given, within the metropolitan district, the powers given by said section 14; so that the decision of the court applies here: with the result, that the State Fire Marshal had, and the Commissioner of Public Safety has, on the appeal now before him, the right not only to consider the fire hazard

but, as the court pointed out, the right to give consideration to those who may be inconvenienced and annoyed, and to have a proper regard for the general good order and welfare of the community.

REGISTRAR OF MOTOR VEHICLES — RECORDS IN CERTAIN CRIMINAL CASES.

It is the duty of courts and trial justices to send to the Registrar of Motor Vehicles abstracts of records of cases in which persons are charged with violations of the automobile laws, when such cases have been disposed of.

Courts and trial justices are not bound to send to the Registrar of Motor Vehicles abstracts of cases which have been continued but not disposed of.

You request my opinion as to whether the courts are required to send to the Registrar of Motor Vehicles abstracts of certain records of cases in which persons are charged with violation of any of the provisions of G. L., c. 90.

G. L., c. 90, § 27, provides, in part: —

A full record shall be kept by every court and trial justice of every case in which a person is charged with a violation of any provision of this chapter, and an abstract of such record shall be sent forthwith by the court or trial justice to the registrar. Said abstracts shall be made upon forms prepared by the registrar, and shall include all necessary information as to the parties to the case, the nature of the offence, the date of the hearing, the plea, the judgment and the result; and every such abstract shall be certified by the clerk of the court or by the trial justice as a true abstract of the record of the court.

It is the clear intent of the statute that abstracts of records of cases that are disposed of, regardless of the manner of disposition, shall be sent forthwith to the Registrar of Motor Vehicles. I am therefore of the opinion that it is the duty of courts and trial justices in all cases in which persons are charged with a violation of any provision of G. L., c. 90, to send forthwith to the Registrar abstracts of records of such cases as have been disposed of. This includes cases where there has been an acquittal, a con-

To the Com-
missioner of
Public Works.
1923
November 30.

viction and fine, or the defendant placed on probation, or where a plea of nolo has been accepted and the case placed on file. Courts and trial justices are not bound to send to the Registrar abstracts of cases which have been continued from time to time but have not been disposed of.

STATE HOUSE GROUNDS — TRAFFIC AND PARKING REGULATIONS — AUTHORITY OF SUPERINTENDENT OF BUILDINGS.

Pursuant to statutory authority, the title to the ways within the State House grounds has been acquired by the Commonwealth, and the streets formerly located therein have been discontinued.

Under G. L., c. 8, §§ 4, 9 and 12, and c. 85, § 23, the Superintendent of Buildings, with the approval of the Governor and Council, may make traffic and parking regulations applicable to ways within the State House grounds, and may enforce such regulations through watchmen appointed by him.

To the Superintendent of
Buildings.
1923
December 5.

You ask me to give you my opinion as to the following points: —

1. As to the authority of the Superintendent of Buildings to make traffic regulations and enforce the same.
2. As to the authority of the Superintendent of Buildings to make parking regulations and enforce the same.
3. As to the jurisdiction of the Superintendent of Buildings over Mt. Vernon Street between Bowdoin and Hancock streets with reference to parking and traffic.
4. As to the jurisdiction of the Superintendent of Buildings over the driveway within the State House yard, from a point opposite the end of Ashburton Place to the junction of the driveway with Mt. Vernon Street, as to parking and traffic.
5. If you find that the Superintendent of Buildings has authority and jurisdiction in the above matters, can he vest that authority in the watchmen in his department who act as traffic officers?

By St. 1888, c. 349, and several succeeding statutes, a taking was authorized by purchase or otherwise, in the name and behalf of the Commonwealth, of land adjacent to or near the State House, including that portion of Mt. Vernon Street as now extended from Hancock Street to Bowdoin

Street and the driveway from a point opposite the end of Ashburton Place to its junction with Mt. Vernon Street. Said succeeding statutes are St. 1892, c. 404; St. 1893, c. 450; St. 1894, c. 532; and St. 1901, c. 525. St. 1888, c. 349, § 6, also authorized the discontinuance of Temple Street, between Mt. Vernon Street and Derne Street, and any other avenue or way on the land acquired or taken under the act; and St. 1901, c. 525, authorized the closing of Mt. Vernon Street from Beacon Street to the State House Arch.

Pursuant to the authority so granted, the land described in these statutes has been acquired by the Commonwealth and title is vested in the Commonwealth, in fee, and Temple Street, from Derne Street to Mt. Vernon Street, and Mt. Vernon Street, from Hancock Street to Beacon Street, have been discontinued, by takings duly recorded with Suffolk Deeds (Lib. 1849, fol. 225; Lib. 2076, fol. 245; Lib. 2124, fol. 507), and by order of the Governor and Council, July 24, 1901. The order of the Governor and Council is as follows:—

Ordered: That the Governor and Council acting under chapter 525 of the acts of the current year and under every other power and authority hereto enabling, hereby close Mt. Vernon street from Beacon street to the State House Arch, and lay out for use as a park, with driveways, walks, grass-plots, curbing and railing, with new approaches to the State House from Bowdoin street and from Beacon street, that tract of land lying easterly of the State House and westerly of Bowdoin street as widened and established by an order of the Governor and Council of even date herewith, in accordance with Plan No. 1717-15, made by Ernest W. Bowditch, Landscape Engineer, Boston, Mass., July 2, 1901, and on file with the records of the council.

Plan No. 1717-15, referred to in said order, shows the driveway from a point opposite the end of Ashburton Place to its junction with Mt. Vernon Street substantially as it now is.

The powers and duties of the Superintendent of Buildings are defined in G. L., c. 8. Sections 4, 9 and 12 of that chapter contain the following provisions:—

SECTION 4. He may appoint such clerks, engineers, electricians, firemen, oilers, mechanics, watchmen, elevator operators, porters, cleaners and other persons as may be necessary to enable him to perform his duties.

SECTION 9. The superintendent shall, under the supervision of the governor and council, have charge of the care and operation of the state house and its appurtenances . . .

SECTION 12. The superintendent shall take proper care to prevent any trespass on, or injury to, the state house or its appurtenances, or any other building or part thereof in Boston owned by or leased to the commonwealth for public offices; and if any such trespass or injury is committed, he shall cause the offender to be prosecuted therefor. For any criminal offence committed in any part of the state house or the grounds appurtenant thereto, or in any other building in Boston owned by or leased to the commonwealth, the superintendent and his watchmen shall have the same power to make arrests as the police officers of Boston.

G. L., c. 85, § 23, is as follows: —

The governor, with the advice and consent of the council, may make by-laws for the regulation of travel on ways belonging to the commonwealth. Whoever violates any such by-law shall be punished by a fine of not more than fifty dollars.

In my opinion, these provisions contain a sufficient grant of authority to the Superintendent of Buildings to make traffic and parking regulations applicable to the ways referred to in your inquiry, which should be approved by the Governor and Council, and to enforce such regulations through the watchmen appointed by him. See *Commonwealth v. Brooks*, 109 Mass. 355; *Commonwealth v. Mulhall*, 162 Mass. 496; *Commonwealth v. Newhall*, 205 Mass. 344.

TAXATION — DOMESTIC BUSINESS CORPORATION — DEDUCTION ON ACCOUNT OF LEASEHOLD INTEREST.

The purpose of the deductions in the corporation tax law is to avoid double taxation. Leaseholds are not real estate subject to local taxation, and therefore are not deductible, under G. L., c. 63, §30, par. 3, (a) and (c), whether the property is within or outside the Commonwealth.

Since buildings on land are taxable with the land as real estate, although by agreement, as against the owner, they may be considered as personal property, a lessee corporation is not entitled to a deduction on account of a building erected by it on the land of another.

You ask my opinion upon various questions concerning the right of a domestic business corporation owning a leasehold interest in real estate to a deduction under G. L., c. 63, § 30, par. 3, (a) and (c), on account of such leasehold interest. Said provisions are as follows:—

To the Commissioner of
Corporations
and Taxation.
1923
December 10.

3. "Corporate excess," in the case of a domestic business corporation, the fair cash value of all the shares constituting the capital stock of a corporation on the first day of April when the return called for by section thirty-five is due, less the value of the following:

(a) The works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the interest of a mortgagee.

(c) Its real estate, machinery, merchandise and other tangible property situated in another state or country, except such part thereof as represents the interest of a mortgagee.

Apart from statute a lease of land is, in a general sense, personal estate. It is, however, an interest in land, and is called a chattel real. *Moulton v. Commissioner of Corporations and Taxation*, 243 Mass. 129. In Massachusetts it is provided by statute (G. L., c. 4, § 7) that "in construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears: . . . Seventeenth, 'Land,' 'lands' and 'real estate' shall include lands, tenements and hereditaments, and all rights thereto and interests therein"; and our court has said that "these words are broad enough to comprehend leases." *Moulton*

v. *Commissioner of Corporations and Taxation*, *supra*, 132. If, therefore, the question were simply whether the words "real estate," occurring in G. L., c. 63, § 30, par. 3, (a) and (c), should be construed to include leaseholds, without taking into account their context and the history of their use in that connection, the answer would not be free from doubt. Consequently, your inquiry requires some examination of the history and purpose of the corporation tax laws of Massachusetts.

The first statute providing for a franchise tax on corporations was St. 1864, c. 208. Under that act an excise was levied upon the franchise of domestic corporations, based upon the total value of their capital stock after deducting the value of their real estate and machinery for which they were actually locally taxed. *Commonwealth v. Hamilton Mfg. Co.*, 12 Allen, 298; *New England, etc., S. S. Co. v. Commonwealth*, 195 Mass. 385; *Simplex Elec. Heating Co. v. Commonwealth*, 227 Mass. 225. Sections 1 and 5 of the act were as follows: —

SECTION 1. The assessors of the several cities and towns shall annually, on or before the first Monday of August, return to the treasurer of the Commonwealth the names of all corporations having a capital stock divided into shares, chartered by this Commonwealth or organized under the general laws and established in their respective cities and towns, or owning real estate therein, and the value of the real estate and machinery for which each was taxed in such cities and towns on the first day of May preceding.

SECTION 5. The treasurer and the auditor of the Commonwealth shall be a board of commissioners who shall, excepting in the cases of telegraph, coal and mining companies, and such railroad companies as own lines of railroad extending beyond the limits of the state, ascertain from the returns or otherwise, the excess of the market value of all the capital stock of each corporation or banking association not exempted from taxation, state and municipal, by the laws of the United States, over the value of its real estate and machinery, if any, as returned under the first section of this act, and shall annually, on or before the first Monday of October, notify its cashier or treasurer respectively, of the excess thus ascertained; and every such corporation or banking association shall annually, on or

before the first Monday of November, pay to the treasurer of the Commonwealth a tax of one and one-sixth per cent. upon such excess. Nothing in this section shall affect the liability of any bank, insurance company, or any other corporation for any other tax imposed upon it, and payable to the treasurer of the Commonwealth under other existing laws.

By St. 1865, c. 283, it was provided that the Tax Commissioner should determine the value and amount of all real estate and machinery owned by each corporation and subject to local taxation, instead of merely taking the local assessors' figures, the rate was changed from one and one-sixth per cent to the average tax rate of all the cities and towns, and the deduction was extended to include the value of real estate and machinery wherever situated. Sections 1, 4 and 5 of that act were, in part, as follows: —

SECTION 1. The assessors of the several cities and towns shall annually, on or before the first Monday of August, return to the tax commissioner hereinafter named, the names of all corporations, except banks of issue and deposit, having a capital stock divided into shares, chartered by this Commonwealth or organized under the general laws, for purposes of business or profit, and established in their respective cities and towns, or owning real estate therein, and a statement in detail of the works, structures, real estate and machinery owned by each of said corporations, and situated in such city or town, with the value thereof, on the first day of May preceding, and the amount at which the same is assessed in said city or town for the then current year. They shall also, at the same time, return to said tax commissioner the amount of taxes laid, or voted to be laid, within said city or town, for the then current year, for state, county and town purposes, including highway taxes.

SECTION 4. The tax commissioner shall ascertain, from the returns or otherwise, the true market value of the shares of each corporation included in the provisions of section three, and shall estimate therefrom the fair cash valuation of all of said shares constituting the capital stock of such corporation on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this act.

He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and to the deductions hereinafter provided; and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount

or value; but such local assessment shall not be conclusive of the true amount or value thereof.

SECTION 5. Every corporation embraced in section three shall annually pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon property in the Commonwealth during the same current year, as returned by the assessors of the several cities and towns under section one, upon the aggregate valuation of all the cities and towns in the Commonwealth for the preceding year, as returned under chapter one hundred and sixty-seven of the acts of the year eighteen hundred and sixty-one, and acts in addition thereto: . . . From the valuation, ascertained and determined as aforesaid, there shall be deducted,— . . . *Second*, in case of other corporations, included in section three, an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated.

The system thus established was substantially continued down to the enactment of St. 1903, c. 437. *New England, etc., S. S. Co. v. Commonwealth*, 195 Mass. 385, 387. In that statute additional deductions were allowed of the value of securities which, if owned by a natural person resident in the Commonwealth, would not be liable to taxation, and of property generally (instead of real estate and machinery only) situated in another state or country and subject to taxation therein. It was held that the word "property," there used, meant tangible property, such as real estate, merchandise, machinery and animals. *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51; *Simplex Elec. Heating Co. v. Commonwealth*, 227 Mass. 225. See Nichols, Taxation in Massachusetts, 2nd ed., p. 542. In 1902 underground conduits, wires and pipes were made locally taxable, and their value was deducted from the corporate franchise tax. St. 1902, c. 342. Poles were treated in the same way in 1909. St. 1909, c. 439. See St. 1909, c. 490, pt. III, § 41; Nichols, Taxation in Massachusetts, 2nd ed., p. 539. As thus modified, the franchise tax law was continued without modification important to this

discussion until 1919. In that year the structure of the corporation tax law was materially changed and a tax on income was added as an additional factor of the tax. Gen. St. 1919, c. 355; codified in G. L., c. 63, §§ 30-52. The provisions of the old law for determining the value of the corporate franchise were then carried over and applied to the determination of the "corporate excess" which forms the basis of one factor of the present excise tax.

The reason for the deduction allowed for real estate and machinery in the acts of 1864 and 1865 was to avoid double taxation, the real estate and machinery of corporations being subject to local taxation in the towns where they were situated. *Commonwealth v. Hamilton Mfg. Co.*, 12 Allen, 298, 305, 306; *Firemens Ins. Co. v. Commonwealth*, 137 Mass. 80, 83. The deductions were extended when it was found that in some other respects the system resulted in double taxation of corporations. *Farr Alpaca Co. v. Commonwealth*, 212 Mass. 156, 159, 160. But a corporation was entitled to deductions only so far as deductions were allowed by the statute. *Commonwealth v. New England Slate & Tile Co.*, 13 Allen, 391; *Simplex Elec. Heating Co. v. Commonwealth*, 227 Mass. 225, 229.

By St. 1881, c. 304, §§ 1-3, the local tax law was amended by making provision for taxing separately as real estate the interest of a mortgagee (see G. L., c. 59, §§ 12-14). In *Firemens Ins. Co. v. Commonwealth*, 137 Mass. 80, 83, it was held that this statute made the interest of a mortgagee, for all purposes of taxation, real estate subject to local taxation, and thus brought such interest within the words of the corporation franchise tax law, requiring the Tax Commissioner to deduct an amount equal to the value "of their real estate and machinery, subject to local taxation, wherever situated." The rule thus declared prevailed until Gen. St. 1919, c. 332, which amended the previous law by excepting from the deductions allowed "that part of the said value which, as matter of law, may be deemed to be real estate and is represented by a mortgage debt." This was

to prevent the amount of a mortgage from being deducted twice. Nichols, *Taxation in Massachusetts*, 2nd ed., pp. 539, 540. This exception is carried over into G. L., c. 63, § 30, par. 3, (a) and (c).

Leaseholds are not, for purposes of taxation, real estate subject to local taxation. "Taxes on real estate shall be assessed, in the town where it lies, to the person who is either the owner or in possession thereof on April first." G. L., c. 59, § 11. Except for the separate tax on the interest of a mortgagee, a real estate tax is a tax on the land as a whole and not merely on the interest of the person taxed, although the tax may be assessed either to the owner or to the person in possession of the land. *Parker v. Baxter*, 2 Gray, 185, 189; *Worcester v. Boston*, 179 Mass. 41, 48; *Donovan v. Haverhill*, 247 Mass. 69.

It is obvious, therefore, that a domestic corporation owning a leasehold interest in Massachusetts real estate is not entitled, under G. L., c. 63, § 30, par. 3 (a), to a deduction of the value of that interest. It is only the value of "real estate . . . subject to local taxation" which may be deducted. "Real estate," for the purpose of the deduction provided by G. L., c. 63, § 30, par. 3 (a), as well as for the purpose of assessment under G. L., c. 59, § 11, is the entire estate, and not some lesser interest therein. This deduction, by the terms of the statute, is allowed to a corporation only when it owns estate in the sense described. It is not allowed to a corporation which owns a lease merely, or even a mortgage interest. It is not allowed to a lessee corporation even if the land is assessed to the lessee as occupant, but the lessee may recover the tax of his landlord unless there is a different agreement between them. G. L., c. 59, § 15. See Nichols, *Taxation in Massachusetts*, 2nd ed., p. 540.

Prior to Gen. St. 1919, c. 332, the provision for a deduction of the value of real estate and certain other kinds of property *outside the jurisdiction*, first authorized by St. 1865, c. 283, and extended by St. 1903, c. 437, § 72, was limited by the

phrase "subject to local taxation," or, in the language of the act of 1903, "subject to taxation therein." That phrase was omitted in Gen. St. 1919, c. 332, and in the corresponding provision of Gen. St. 1919, c. 355, pt. I, § 1, because it was found that corporations were being taxed in many states by excise or income taxes on their local business rather than by taxes directly on their property in the jurisdiction, and that they were consequently suffering from the effects of a considerable amount of double taxation. See report of joint special committee on taxation, Senate Document No. 313 of 1919. Thereafter a corporation was entitled to a deduction on account of the value of real estate and other tangible property outside the Commonwealth, whether or not the property was directly subject to taxation where it was situated. The purpose of the change was to exempt from an indirect tax by the Commonwealth property, situated elsewhere, which was indirectly, but not directly, taxed where it was situated. This was in accordance with the "progressive tendency" of our statutes, referred to in *Farr Alpaca Co. v. Commonwealth*, 212 Mass. 156, 159, 160, "to prevent the technical distinction between excises and property taxes from resulting in double taxation." The words "real estate," as used in clause (c), were not intended, in my judgment, to have a different and broader meaning from that which they have in clause (a), i. e., the land itself, although in clause (c) they are not qualified by the words "subject to local taxation." This view is to some extent supported by the correlation of the words "other tangible property." Cf. *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51; *Simplex Elec. Heating Co. v. Commonwealth*, 227 Mass. 225. It is my opinion, therefore, that a domestic corporation is not entitled to a deduction for a leasehold interest in real estate outside the Commonwealth.

You also ask to what deduction, if any, a lessee corporation is entitled on account of a building erected by it on the land of another.

A building may be considered as personal property

belonging to a person other than the owner of the land to which it is affixed, as against the owner of the land and others having notice, if at the time it was annexed there was an agreement, express or implied, that it should be so held. *First Parish in Sudbury v. Jones*, 8 Cush. 184, 189, 190; *Gibbs v. Estey*, 15 Gray, 587; *Howard v. Fessenden*, 14 Allen, 124, 128; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Madigan v. McCarthy*, 108 Mass. 376; *Trask v. Little*, 182 Mass. 8.

But "buildings affixed to land are in their nature real property, and they are only considered as personal property between the parties to an agreement making them such and those who purchase the land with knowledge of the agreement; they pass as a part of the land to a purchaser for value without notice." *McGee v. Salem*, 149 Mass. 238, 240. The tax law makes no provision for taxing buildings separately from the land. On the contrary, G. L., c. 59, § 3, provides: —

Real estate for the purpose of taxation shall include all land within the commonwealth and all buildings and other things erected thereon or affixed thereto. . . .

Accordingly, it has been held that all buildings on land are taxable with the land as real estate. *Phinney v. Foster*, 189 Mass. 182, 187. See also *Milligan v. Drury*, 130 Mass. 428; *McGee v. Salem*, 149 Mass. 238.

By St. 1909, c. 490, pt. III, § 41, cl. 3rd, the provision giving to domestic business corporations a deduction of the value of certain property within the Commonwealth subject to local taxation was changed by inserting the words "works" and "structures." These words would seem to be superfluous. The reason for their inclusion is stated in the report of the commission on taxation for the year 1908, in the following note, at page 205: —

By the provisions of section 40 (Revised Laws, chapter 14, section 37; Acts of the year 1906, chapter 463, part II, section 211, part III, section 125; chapter 516, section 14), corporations are required, among other

things, to make return of their works, structures, real estate and machinery. This requirement is clearly for the purpose of giving to the Tax Commissioner such information as will aid him in making the deductions provided for in this section. While it may be doubtful that anything can be included in the words "works, structures" that could not fairly be embraced within the meaning of real estate and machinery, the commission has thought it proper to employ the same phraseology in the deduction as in the return section; and therefore has added the words "works, structures," omitted in Revised Laws, chapter 14, section 38, in this and other sections where a corresponding omission occurs.

Clearly, in my opinion, they do not serve to extend to a lessee corporation a right to deduct the value of a building which, as between itself and its lessor, is personal property belonging to the lessee, since such a structure is taxable to the lessor as real estate.

STATE RETIREMENT ASSOCIATION — WORKMEN'S COMPENSATION — INJURED EMPLOYEE — RETIREMENT.

Payments made in accordance with the requirements of the Workmen's Compensation Act are not to be construed by the Board of Retirement as salary or wages.

If a member of the Retirement Association above the age of seventy years applies for retirement because of age and service and not because of any disability, his retirement allowance should be figured from the date on which he should have automatically been removed from the service at the age of seventy years, in accordance with the statute [G. L., c. 32, § 2, par. (4)].

I acknowledge the receipt of your communication wherein you state as follows: Because of an injury received on July 20, 1918, a member of the Retirement Association was awarded, by agreement between the Industrial Accident Board and the Metropolitan Water and Sewerage Board, now the Metropolitan District Commission, weekly payments of workmen's compensation. These weekly payments to him continued until September 27, 1923, when the Industrial Accident Board approved an agreement to redeem liability by the payment of \$1,100 in a lump sum.

During the time the workmen's compensation payments

To the Board
of Retirement.
1923
December 13.

.

were being made to this beneficiary he retained his membership in the Retirement Association, because at the time of his injury he had reached sixty years of age and had completed at least fifteen years of service. This member has now applied for retirement under the provisions of the general contributory law, because of his age and service and not because of any disability for which the workmen's compensation payments were paid to him. He has submitted proof that he is older than he has always claimed to be, so that if he had not been injured and had remained in the service, this proof of age would have required his retirement four years ago, at age seventy, the compulsory retirement age.

You request my opinion upon the following questions based on the above facts:

1. Has the Board of Retirement the right now to retire the aforesaid member?
2. If the answer to question 1 is in the affirmative, from what date shall the payment of the retirement allowance be figured — (a) the date the application for retirement was made, or (b) the date the aforesaid member would have been automatically removed from the service at the age of seventy years?

G. L., c. 32, § 2 (4), provides as follows: —

Any member who reaches the age of sixty and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire or be retired by the board upon recommendation of the head of the department in which he is employed, or, in case of members appointed by the governor, upon recommendation of the governor and council, and any member who reaches the age of seventy must so retire.

G. L., c. 32, § 5 (2) A (a), provides as follows: —

Should a member of the association enter a position in the service of the commonwealth not covered by sections one to five, inclusive, or cease to be an employee of the commonwealth for any cause other than death, or for the purpose of entering the service of the public schools as defined

in section six, before becoming entitled to a pension, there shall be refunded to him all the money paid in by him under section four (2) A, with such interest as shall have been earned thereon.

In an opinion of a former Attorney General (V Op. Atty. Gen. 192) it was held that, —

The phrase “before becoming entitled to a pension” must be interpreted as meaning before having become entitled to retire as a matter of right. It thus restricts refunds to persons who have not yet acquired voluntary retirement rights.

The member in question, having retained his membership in the Retirement Association, is now entitled to retirement, and your board has the right to retire him under the provisions of G. L., c. 32, § 2 (4), and I so answer your first question.

In an opinion of a former Attorney General to the Treasurer and Receiver General, dated December 21, 1914, it was decided that payments made in accordance with the requirements of the Workmen’s Compensation Act are not to be construed by the Board of Retirement as salary or wages. This is in conformity with the decision of the Supreme Judicial Court in *King v. Viscoloid Co.*, 219 Mass. 420, wherein the court says (p. 425): —

It has been suggested that the statutory compensation given to an . . . employee is really a payment of wages . . . But this is not so. The *quantum* of the compensation is measured by the amount of the wages; but the payment is in place of all the rights of action that belong to the injured employee, and covers suffering and temporary or permanent disability as well as loss of wages.

G. L., c. 152, § 69, provides as follows: —

The commonwealth and any county, city, town or district having the power of taxation which has accepted chapter eight hundred and seven of the acts of nineteen hundred and thirteen shall pay to laborers, workmen and mechanics employed by it who receive injuries arising out of and in the course of their employment, or, in case of death resulting from such injury, to the persons entitled thereto, the compensation required by

this chapter. Sections sixty-nine to seventy-five, inclusive, shall apply to the commonwealth and to any county, city, town or district having the power of taxation which has accepted said chapter eight hundred and seven of the acts of nineteen hundred and thirteen.

G. L., c. 152, § 73, provides as follows: —

Any person entitled to receive compensation as provided by section sixty-nine from the commonwealth or from such county, city, town or district, who is also entitled to a pension by reason of the same injury, shall elect whether he will receive such compensation or such pension, and shall not receive both. If a person entitled to such compensation from the commonwealth or from such county, city, town or district receives by special act a pension for the same injury, he shall forfeit all claim for compensation; and any compensation received by him or paid by the commonwealth or by such county, city, town or district which employs him for medical or hospital services rendered to him may be recovered back in an action at law. No further payment shall be awarded by vote or otherwise to any person who has claimed and received compensation under sections sixty-nine to seventy-five, inclusive.

G. L., c. 32, § 2 (4), provides, in part, as follows: —

. . . and any member who reaches the age of seventy must so retire.

This provision is explicit. I am accordingly of the opinion that inasmuch as the member in question applied for retirement because of age and service and not because of any disability, his retirement allowance should be figured from the date on which he should have automatically been removed from the service at the age of seventy years, in accordance with the statute [G. L., c. 32, § 2, (4)].

HAWKERS AND PEDLERS — AGENTS — LICENSE.

Under the provisions of G. L., c. 101, §§ 13, 14 and 18, no one may peddle under a license except the person named therein. Accordingly, if a sale is made by an agent or representative, he and not his principal must be licensed to make such sale.

You request my opinion on the following question: —

Is there any statutory provision which would permit any person to peddle under a hawker's and pedler's license other than the one to whom such license has been issued or transferred?

To the Com-
missioner of
Labor and
Industries.
1923
December 20.

G. L., c. 101, § 13, defines hawkers and pedlers as follows:—

Except as hereinafter expressly provided, the terms "hawker" and "pedler" as used in this chapter shall mean and include any person, either principal or agent, who goes from town to town or from place to place in the same town selling or bartering, or carrying for sale or barter or exposing therefor, any goods, wares or merchandise, either on foot, on or from any animal or vehicle.

G. L., c. 101, § 14, provides: —

A hawker or pedler who sells or barter or carries for sale or barter or exposes therefor any goods, wares or merchandise, except as permitted by this chapter, shall forfeit not more than two hundred dollars, to be equally divided between the commonwealth and the town in which the offence was committed.

G. L., c. 101, § 18, provides: —

Articles other than those the sale of which is licensed, or permitted without a license, under the preceding section, and not prohibited by section sixteen, shall not be sold by hawkers or pedlers unless duly licensed as hereinafter provided.

Any person who attempts to sell under a license "which has not been issued or transferred to him, or has in his possession another's license with intent to use the same" shall be punished as provided in section 31.

The authority to grant hawker's and pedler's licenses is

vested in the Director of Standards, in accordance with the provisions of G. L., c. 101, § 22, which is, in part, as follows:

The director may grant a license to go about carrying for sale or barter, exposing therefor and selling or bartering any goods, wares or merchandise, the sale of which is not prohibited by section sixteen, to any person who files in his office a certificate signed by the mayor or by a majority of the selectmen, stating that to the best of his or their knowledge and belief the applicant therein named is of good repute as to morals and integrity, and is, or has declared his intention to become, a citizen of the United States.

This section discloses the safeguards employed in the selection of those individuals who are to be entrusted with such licenses.

I am of the opinion that your question is answered by the express provisions of G. L., c. 101, § 13, wherein the Legislature, in defining hawker and pedler, has expressly included "any person, either principal or agent." The intent of the Legislature to forbid any person to peddle under a hawker's and pedler's license other than the one to whom such license has been issued or transferred is clearly disclosed. G. L., c. 101, § 31.

In *Commonwealth v. Hana*, 195 Mass. 262, at page 265, the court says:—

The business of peddling furnishes such opportunities for the practice of fraud that it is a proper subject for legislative regulation.

The language employed in the statute is unquestionably chosen in order to emphasize the fact that no one may peddle under a license except the person named therein. Accordingly, if a sale is made by an agent or representative, he and not his principal must be licensed to make such sale. See *Commonwealth v. Reid*, 175 Mass. 325; *Commonwealth v. Ober*, 12 Cush. 493.

I accordingly answer your question in the negative.

BANKS AND BANKING — TRUST COMPANIES — INCREASE OF CAPITAL STOCK — AMENDMENT OF ORIGINAL CHARTER.

A trust company incorporated prior to 1888 may, by adopting G. L., c. 172, §18, as provided in G. L., c. 172, § 3, increase its capital stock to any amount approved by the Commissioner of Banks, without the necessity of amending its original charter, even though that charter prohibited any increase of capital stock beyond \$500,000.

You request my opinion in regard to the B. M. C. Durfee Trust Company of Fall River, Mass. You state that this trust company was incorporated under the provisions of St. 1887, c. 85, and that it is now desirous of increasing its capital stock beyond the limit of \$500,000 imposed by section 15 of that act. You request my opinion as to whether the adoption by this trust company of section 18 of G. L., c. 172, as provided by section 3 of G. L., c. 172, will be sufficient to enable it to increase its capital stock beyond \$500,000 without the necessity of petitioning the Legislature for an amendment to its charter permitting this increase.

The original general act for the regulation of safe deposit, loan and trust companies, St. 1888, c. 413, contained no provision by which trust companies incorporated previous to its passage might adopt the provisions contained therein. St. 1890, c. 315, § 2, however, provided: —

Any incorporated trust company, or safe deposit and trust company, now transacting business in this Commonwealth and chartered by the legislature of this Commonwealth prior to the passage of chapter four hundred and thirteen of the acts of the year eighteen hundred and eighty-eight, may by vote of the majority of the stock represented at a special meeting of the stockholders legally called for the purpose accept and adopt as a part of their charters all the provisions of any one section or all the sections of said chapter four hundred and thirteen of the acts of the year eighteen hundred and eighty-eight; and thereafter shall have all the powers and privileges and be subject to all the duties, liabilities and restrictions set forth in such section or sections as may be thus accepted and adopted: *provided*, that a certificate signed and sworn to by the clerk of such trust company, or safe deposit and trust company, setting forth the fact of such acceptance and adoption shall be filed with

To the Commissioner of
Banks.
1923
December 31.

the secretary of the Commonwealth and with the board of commissioners of saving banks within ten days from the date of such special meeting.

It is to be noted that this act provides that after adoption the trust company "thereafter shall have *all the powers and privileges . . .* set forth in such sections as may be thus accepted and adopted."

The language of St. 1890, c. 315, § 2, was considerably shortened at the time of its incorporation into the Revised Laws as section 2 of chapter 116, and later into the General Laws as section 3 of chapter 172. G. L., c. 172, § 3, reads as follows: —

A trust company chartered before May twenty-eight, eighteen hundred and eighty-eight, transacting business in the commonwealth may adopt as a part of its chapter, or any provision thereof which under the preceding section it may adopt, by a majority vote of the stock represented at a special meeting called for the purpose and by filing, within ten days from the date of such meeting, with the state secretary and with the commissioner a certificate sworn to by the clerk of such corporation and stating such adoption.

Despite this change of language, there seems, however, no reason to believe that any intention existed to change the force of St. 1890, c. 315, § 2, as regards the acquisition by a trust company, after adoption, of "all the powers and privileges" set forth in the adopted sections.

G. L., c. 172, § 18, is based upon R. L., c. 116, § 5, as modified by St. 1905, c. 189, and Gen. St. 1916, c. 37, and subsequent amendments thereto. R. L., c. 116, § 5, provided that the capital stock of trust companies should not be more than one million dollars; St. 1905, c. 189, permitted a trust company, subject to the approval of the Board of Commissioners of Savings Banks, to increase its capital stock up to that maximum in the manner provided for business corporations; and Gen. St. 1916, c. 37, did away with the maximum limitation and provided that trust companies, subject to the approval of the Bank Commissioner, could increase their capital stock up to any amount by the same

method as that authorized in St. 1905, c. 189. The provisions of G. L., c. 172, § 18, are as follows: —

The capital stock of such corporation shall be not less than two hundred thousand dollars, except that in a city or town whose population numbers not more than one hundred thousand the capital stock may be not less than one hundred thousand dollars, divided into shares of the par value of one hundred dollars each; and except also that in towns whose population is not more than ten thousand the capital stock may be not less than fifty thousand dollars divided into shares of the par value of one hundred dollars each; and no business shall be transacted by the corporation until the whole amount of its capital stock is subscribed for and actually paid in. Any such corporation may, subject to the approval of the commissioner, increase its capital stock in the manner provided by sections forty-one and forty-four of chapter one hundred and fifty-six. No stock shall be issued by any such corporation until the par value thereof shall be fully paid in in cash. Any such corporation may, subject to the approval of the commissioner, decrease its capital stock in the manner provided by said section forty-one and the first sentence of section forty-five of said chapter; provided, that the capital stock as so reduced shall not be less than the amount required by this section.

It appears to me, from the above, that G. L., c. 172, § 3, read in the light of St. 1890, c. 315, § 2, permits a trust company incorporated prior to 1888 to secure the powers and privileges set forth in G. L., c. 172, § 18, even though inconsistent with a restriction contained in the original act of incorporation of such a trust company; that between 1905 and 1916 one of the privileges and powers thus acquirable would have been the power, subject to the approval of the Board of Commissioners of Saving Banks, to increase its capital stock up to one million dollars by the method provided for business corporations (now G. L., c. 156, §§ 41 and 44); and that today one of those powers and privileges is the power to increase its capital stock by a similar method to any amount approved by the Commissioner of Banks.

I am therefore led to the conclusion that the B. M. C. Durfee Trust Company can avoid the necessity of petitioning the Legislature for an amendment to its charter by the adoption of G. L., c. 172, § 18, as provided in G. L., c. 172, § 3, and I accordingly answer your inquiry in the affirmative.

STRUCTURES IN GREAT PONDS — LICENSE.

A license is not required for a structure built in the waters of a great pond unless it is below the natural high-water mark.

To the Com-
missioner of
Public Works.
1924
January 3.

You request my opinion whether a license is required for the erection of a structure in the waters of a great pond, the height of which has been raised several feet and the area of which has been increased by the lawful construction of a dam, the structure being above the natural high-water mark of the pond but below the maximum flow line caused by the dam.

G. L., c. 91, § 13, provides, in part: —

The division may license any person . . . to build and extend a wharf, pier or shore wall *below high water mark* in said river, or to build or extend a wharf, pier, dam, wall, road, bridge or other structure, or to drive piles, fill land or excavate in or over the waters of any great pond below *natural* high water mark, or at or upon any outlet thereof, upon such terms as the division prescribes; . . .

Section 19 of the act provides, in part: —

Except as authorized by the general court and as provided in this chapter, no structure shall be built or extended, or piles driven or land filled, or other obstruction or encroachment made, in, over or upon the waters of any great pond below the *natural* high water mark; . . .

The basis of this legislation is found in St. 1888, c. 318, § 4, which provides that a license may be issued to build a structure, etc., in any great pond "below high-water mark," and in St. 1888, c. 318, § 2, which provides that except as authorized in the act no structure, etc., shall be built in any great pond "below the high-water mark thereof."

In R. L., c. 96, §§ 15 and 18, which reenact St. 1888, c. 318, §§ 2 and 4, the word "natural" was inserted, so that the law then read and now reads "below the *natural* high-water mark." That the insertion of the word "natural" was deliberate and not accidental is shown by the fact that both G. L., c. 91, § 13, and R. L., c. 96, § 18, which provide

for licenses for structures in great ponds below the natural high-water mark, also provide for licenses for structures in the Connecticut River "below high-water mark." The original statute with respect to licenses for structures in the Connecticut River (St. 1885, c. 344, § 3) read "below high-water mark," and this language has not been changed or amended. It is conceivable that the Legislature, in enacting the sections referred to in the General Laws and Revised Laws, would, in the same sections, have inserted the word "natural" with respect to great ponds and have failed to make the insertion with respect to the Connecticut River unless the insertion was deliberate and designed to change the existing law.

I am therefore of the opinion that a license is not required for a structure built in the waters of a great pond unless it is below the natural high-water mark.

SAVINGS BANKS — SALE OF TRAVELERS' CHECKS AND LETTERS OF CREDIT.

A travelers' check or letter of credit is not a transmission of money or the equivalent thereof within the meaning of G. L., c. 168, § 33A.

You request my opinion as to whether G. L., c. 168, § 33A, should be so construed as to permit the sale of travelers' checks and letters of credit. Said section reads as follows:—

To the Com-
missioner of
Banks.
1924
January 3.

Savings banks may, under regulations made by the commissioner, receive money for the purpose of transmitting the same, or equivalent thereof, to another state or country.

In the broadest sense, and a sense often used by the courts, a letter of credit is any letter whereby the writer arranges for some other persons to obtain credit. 35 Harvard Law Review, 542. Daniel on Negotiable Instruments, vol. 2, 6th ed., § 1790, says:—

A letter of credit may be defined to be a letter of request whereby one person requests some other person to advance money or give credit to a

third person, and promises that he will repay or guarantee the same to the person making the advancement, or accept bills drawn upon himself for the like amount.

See also *Leggett v. Levy*, 233 Mo. 590; *Krakauer v. Chapman*, 16 App. Div. 115.

The primary purpose of the commercial letter of credit is to enable the shipper to receive his money upon shipment; to enable the buyer to postpone actual payment until the goods have been received and resold; to enable a bank to lend its credit and not its funds; to utilize the goods as security in the meantime.

A travelers' letter of credit is similar in principle to a commercial letter, but is made use of for facilitating a supply of money required by one going to a distance or abroad, and avoiding the risk and trouble of carrying specie or buying bills to a greater amount than may be required.

A letter of credit is not drawn against any fund; it is not payable absolutely but only in the event that the letter bearer may use it; it is optional with him. It is, as viewed from the standpoint of the bank, simply the lending of the bank's credit and not of its funds.

Travelers' checks are used almost exclusively by travelers. They are generally for specific sums, and are in fact letters of credit which a banking house gives a traveler, and which are made available on presentation to any of the agents or correspondents of the house in a long list of names, the names both of the places and of the agents in them being usually stated in the instrument itself. They may be cashed only upon being countersigned by the person to whom they were issued, and ordinarily only in the presence of the person to whom they are presented for payment. It is the countersignature by which the holder is identified in a strange place. If they are lost they are refunded. Like letters of credit, they may not be used; that is optional with the holder. He may return unused ones and be reimbursed. The check is simply a promise of the bank to pay in the event that it is presented and properly countersigned.

James Sullivan v. Wilhelm Kanuth, 220 N. Y. 216; *Samburg v. American Express Co.*, 136 Mich. 639.

In my opinion, a travelers' check or letter of credit is not a transmission of money or the equivalent thereof, within the meaning of the statute.

ABOLITION OF GRADE CROSSINGS — RIGHT OF TOWNS TO
A REFUND FROM THE COMMONWEALTH FOR INTEREST
PAID.

St. 1914, c. 18, § 1, did not take away, as to grade crossing debts incurred prior thereto, the right of a town under St. 1908, c. 390, § 2, to a refund from the Commonwealth of the excess of the amount of interest paid by the town over the actual cost to the Commonwealth for money borrowed for the abolition of grade crossings.

You have brought to my attention a communication received by you from the treasurer and collector of taxes of the city of Somerville in regard to a claim of the city of Somerville for refund of interest on account of grade crossing debts.

To the
Treasurer and
Receiver
General.
1924
January 3.

You state that this claim is based upon the fact that the city of Somerville has paid interest at 4 per cent upon grade crossing debts incurred under St. 1908, c. 390, § 2, prior to the passage of St. 1914, c. 18, § 1, amounting in all to \$18,774.95. This sum represents interest payments made since as well as before 1914, as the rate of 4 per cent was maintained unchanged even after 1914 as to all grade crossing debts incurred prior to that date. The city of Somerville now claims a refund, as provided for in St. 1908, c. 390, § 2, equal to the difference between the amount of interest at 4 per cent paid by it and "the actual interest cost to the Commonwealth for money borrowed for the abolition of grade crossings. . . ."

Upon the above facts you request my opinion as to whether the city of Somerville has a valid claim at this time for a refund of overpayment of interest, and if so, "to what date shall the interest be figured."

St. 1908, c. 390, § 2, reads, in part, as follows: —

The court shall, from time to time, issue its decrees for payments on the part of the railroad corporation and on the part of any street railway company, not exceeding the amounts apportioned to them respectively by said auditor in his report, and for the payment by the commonwealth of a sum not exceeding the amounts apportioned to it and to the city or town; and such city or town shall repay to the commonwealth the amount apportioned to it, with interest thereon, payable annually at the rate of four per cent from the date of the acceptance of the report of the auditor. Such repayment of the principal shall be made annually in such amounts as the auditor of the commonwealth may designate; and the amount of payment designated for the year, with the interest due on the outstanding principal, shall be included by the treasurer and receiver general in the amount charged to such city or town, and shall be assessed upon it in the apportionment and assessment of its annual state tax. The treasurer and receiver general shall in each year notify such city or town of the amount of such assessment, which shall be paid by it into the treasury of the commonwealth as a part of, and at the time required for, the payment of its state tax. When the final assessment on a city or town has been paid by it, the treasurer and receiver general shall repay to it, in reduction of said final payment, the amount of interest, if any, which has been assessed to and paid by it in excess of the actual interest cost to the commonwealth for money borrowed for the abolition of grade crossings previous to the payment of said final assessment.

St. 1914, c. 18, § 1, reads, in part, as follows: —

Section thirty-nine of Part I of chapter four hundred and sixty-three of the acts of the year nineteen hundred and six, as amended by section two of chapter three hundred and ninety of the acts of the year nineteen hundred and eight, is hereby further amended by striking out the words "of four per cent," in the thirty-fifth line, and inserting in place thereof the words: — of interest determined by the auditor of the commonwealth as approximately that paid by the commonwealth on the last money borrowed for the abolition of grade crossings, — and by striking out the last sentence, so as to read as follows: — *Section 39.* . . . The court shall, from time to time, issue its decrees for payments on the part of the railroad corporation and on the part of any street railway company, not exceeding the amounts apportioned to them respectively, by said auditor in his report, and for the payment by the commonwealth of a sum not exceeding the amounts apportioned to it and to the city or town; and such city or town shall repay to the commonwealth the amount apportioned to it, with interest thereon, payable annually at the rate of interest determined by the auditor of the commonwealth as approximately that

paid by the commonwealth on the last money borrowed for the abolition of grade crossings, from the date of the acceptance of the report of the auditor. Such repayment of the principal shall be made annually in such amounts as the auditor of the commonwealth may designate; and the amount of payment designated for the year, with the interest due on the outstanding principal, shall be included by the treasurer and receiver general in the amount charged to such city or town, and shall be assessed upon it in the apportionment and assessment of its annual state tax. The treasurer and receiver general shall in each year notify such city or town of the amount of such assessment, which shall be paid by it into the treasury of the commonwealth as a part of, and at the time required for, the payment of its state tax.

The effect of the amendment of 1914 was to repeal by implication so much of the former act as provided that the rate of interest to be paid by a city or town should be 4 per cent, and that the excess of interest paid over actual interest cost should finally be refunded. *Wilson v. Head*, 184 Mass. 515. The question is whether the amendment is applicable to grade crossing debts incurred prior to its enactment, on which interest was paid at the rate of 4 per cent not only before but after 1914.

Where a right to recover money is purely statutory it has been held to be extinguished by the repeal, without a saving clause, of that portion of the act which created it. *Wilson v. Head*, *supra*. There are analogous cases in the criminal law. *Commonwealth v. Marshall*, 11 Pick. 350. But the amendment we are considering struck out not only the right to repayment but also the requirement that the rate of interest to be paid should be 4 per cent. The substantial change made was to do away with the necessity of repayment by providing that the rate to be paid by the cities and towns should be determined by an approximation to that which the Commonwealth was obliged to pay. The natural inference is that the amendment was intended to apply only in cases where the rate of interest was to be determined as provided in the amendment, and was not intended to take away the right of refund where interest was paid under the prior statute at the flat 4 per cent rate.

Furthermore, it seems that the amending act has consistently in practice been construed by those charged with the duty of carrying its provisions into effect as applicable only to grade crossing debts incurred subsequent to its passage, since interest at the 4 per cent rate has uniformly been collected on debts which arose previously. This could only have been done on the theory that to such debts the amendment was not applicable. *Commonwealth v. Parker*, 2 Pick. 550, 557; *Tyler v. Treasurer and Receiver General*, 226 Mass. 306. It would seem, therefore, that the mutual obligations imposed upon the Commonwealth, on the one hand, and the towns, on the other, by St. 1908, c. 390, § 2, should be held to have survived the partial repeal of that act in 1914, provided this conclusion involves no violation of sound legal theory.

When the town's share of a given grade crossing assessment was paid by the State under the provisions of St. 1908, c. 390, § 2, there arose a definite obligation, contractual in its nature, which, if not a true contract, was at least one of those obligations created either by the common law, under the impulse of equitable principles, or by statute, which are grouped under the generic name of *quasi* contractual obligations. This *quasi* debt, if it may be so termed, contained within itself the definition of its own incidents, namely, the duration, interest rate and rebate feature provided for in the statute. The right to a refund was no less inherent in it than any other feature. In fact, strictly, the interest rate may be said to have been "4 per cent minus a certain unascertained future rebate," rather than simply "4 per cent." In the absence, at least, of any expression of legislative intent to the contrary, there seems no reason why such a *quasi* debt, being an existing, definite obligation, should not survive the repeal of the statute under which it originally arose.

In *Steamship Co. v. Joliffe*, 2 Wall. 450, the Supreme Court of the United States, in considering the right of a pilot to the compensation provided for in a statute that had been

repealed after the performance of the services in question, said:—

If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, . . . The transaction, in this latter case, between the pilot and the master or owner, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract. . . .

The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as a *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed.

And it is clear that the legislature did not intend by the repealing clause in the act of 1864, to impair the right to fees, which had arisen under the original act of 1861.

In my opinion, this language is applicable to the present case; and in view of what I have already stated I believe to be the proper inference of legislative intent to be drawn from St. 1914, c. 18, § 1, I am of the opinion that the city of Somerville has a valid claim at this time for a refund of overpayment of interest, and that the amount due should be figured to the date of the payment by the city of Somerville of the final assessment.

PUBLIC RECORDS — CERTIFICATION OF COPIES — SECRETARY OF THE COMMONWEALTH.

Under G. L., c. 9, § 11, the precise form in which copies of public records shall be certified is within the discretion of the certifying officer, but the copies must be full, exact and literal: authentication by seal is impliedly authorized.

To the
Secretary.
1924
January 4.

You request my opinion as to whether you "have the right to certify, substantially in accordance with the form attached to your request, to a birth, marriage or death."

G. L., c. 46, deals with the "Return and Registry of Births, Marriages and Deaths." Section 1 imposes upon each city or town clerk the duty "to receive or obtain and record" certain specified facts "relative to births, marriages and deaths in his town." Section 17 requires that certified copies of such records of births, marriages and deaths be transmitted periodically to the State Secretary. Section 18 reads:—

The state secretary shall require . . . copies transmitted under the preceding section to be written in a legible hand.

Section 21 reads:—

The state secretary shall cause the copies received by him for each year to be bound, with indexes thereto. He shall prepare from said copies such statistical tables as will be of practical utility, and make annual report thereof to the general court.

G. L., c. 66, deals with "Public Records." Public records are defined, in so far as is pertinent to the present inquiry, as follows:—

Any written or printed book or paper . . . which any officer . . . of the commonwealth or of a county, city or town . . . is required to receive for filing. — G. L., c. 4, § 7, par. 26th.

Section 10 of G. L., c. 66, provides:—

Every person having custody of any public records shall, at reasonable times, permit them to be inspected and examined by any person, under

his supervision, and shall furnish copies thereof on payment of a reasonable fee. In towns such inspection and furnishing of copies may be regulated by ordinance or by-law.

Section 7 of G. L., c. 66, reads, in part, as follows: —

The state secretary, clerks of the county commissioners and city or town clerks shall respectively have the custody of all other public records of the commonwealth or of their respective counties, cities or towns, if no other disposition of such records is made by law or ordinance, and shall certify copies thereof.

Finally, G. L., c. 9, § 11, provides: —

The state secretary shall have the custody of the great seal of the commonwealth; and copies of records and papers in his department, certified by him and authenticated by said seal, shall be evidence like the originals.

It follows from the above: —

1. That the certified copies of the records of births, marriages and deaths filed pursuant to G. L., c. 46, with the State Secretary are public documents;

2. That he is authorized to "certify copies thereof"; and

3. That such copies, when authenticated by the great seal of the Commonwealth, "shall be evidence like the originals."

In my opinion, the phrase "shall certify copies thereof" means shall make or cause to be made a full, exact and literal copy of the record in his possession, and shall append thereto a statement to the effect that such document is in fact a full, exact and literal copy of the original record. It is unnecessary to determine whether the phrase also connotes, as an additional requirement, the authentication of the document by affixing thereunto the official seal of the certifying officer; that is, in the case of the State Secretary, the seal of the Commonwealth. See *Hartford Fire Ins. Co. v. Becton & Terrell*, 103 Tex. 236; 125 S. W. 883. In any event, such authentication is not only sanctioned by well-nigh universal practice, but is impliedly authorized by the provision in G. L., c. 9, § 11, quoted above, as to the effect of such authentication by the State Secretary.

Within the limits of the requirements set forth in the preceding paragraph, the precise form in which copies of public records shall be certified is within the discretion of the certifying officer. I see no reason to criticize adversely the form attached by you to your request, nor to doubt that you "have the right to certify, substantially in accordance with the form attached, to a birth, marriage or death." I accordingly answer your inquiry in the affirmative.

WITNESS FEE — EXPERT WITNESSES — COMPULSORY PROCESS — STATE OFFICERS AND EMPLOYEES — COMPENSATION.

The term "witness fee" applies to any sum of money paid to persons subject to compulsory process as compensation for testimony given at the trial of causes. Expert witnesses may in all cases be compelled to appear and testify to such opinions as they may have. Such witnesses cannot be compelled to make a previous study of the case or of other testimony.

State police officers and officers and employees of the Commonwealth receiving regular compensation therefrom may not receive any compensation for testifying in a cause in which the Commonwealth is a party.

Such persons may receive from counties compensation for services which they are not by law compelled to render.

Such persons may not receive from the Commonwealth compensation for special services unless such services are performed outside of usual working hours and are not required in the performance of their duties.

To the District
Attorney for
the Eastern
District.
1924
January 24.

You request my opinion whether any of the persons designated in G. L., c. 262, § 56, when called by the Commonwealth to give an expert opinion in the trial of cases upon matters outside their regular duties, may receive an expert fee from the county.

G. L., c. 262, § 56, provides, in part: —

A state police officer or an officer of the commonwealth whose salary is fixed by law, or any employee of the commonwealth receiving regular compensation therefrom, shall not be entitled to a witness fee before any court or trial justice in a cause in which the commonwealth is a party. . . .

The act, in its scope and intent, is designed to prevent the payment of witness fees, when the Commonwealth is a

party, to persons therein designated whose attendance and testimony at the trial of such causes can be secured by compulsory process. The term "witness fee," as there used, is not restricted to the statutory witness fee. It applies to any amount of money, whether less or more than the statutory fee, paid as compensation for, or in consideration of, testimony given at the trial of causes by persons who are subject to compulsory process. Any other construction would enable one to evade the law by the simple device of paying a sum in excess of the statutory witness fee.

The answer to your inquiry depends upon the question whether persons who have no knowledge of the facts pertaining to the issues of a case and who have had no connection with it, but who, by reason of their special knowledge and training, may give an expert opinion based upon hypothetical questions, can be compelled to appear and testify. If compulsory process may issue for such persons, then the amount paid them for testifying is a witness fee within the purview of G. L., c. 266, § 56, and the persons designated in that section may not lawfully receive any compensation for so testifying. If, however, experts may not be compelled to appear and give expert opinions, the compensation paid them is not a witness fee.

Authorities are divided upon the question whether experts, so called, are subject to compulsory process. Some of the earlier cases and some English cases hold that the special knowledge of a person is his property, which may not be taken from him without reasonable compensation, and that experts may therefore not be compelled to testify as to their opinions. See *Webb v. Page*, 1 Car. & K. 23 (Eng.); *Clark v. Gill*, 1 Kay & J. 19 (Eng.); *Betts v. Clifford*, Warwick Lent Assizes, 1858 (Eng.); *Re Working Men's Mut. Soc.*, L. R., 21 Ch. Div. 831; *In the Matter of Roelker*, Fed. Cas. No. 11,995; *United States v. Howe*, Fed. Cas. No. 15,404a; *Buchman v. State*, 59 Ind. 1; *Dills v. State*, 59 Ind. 15. In Pennsylvania the rule seems to be that experts

are subject to compulsory process in cases where the government is a party but not in causes between private litigants. *Pa. Co. for Insurances v. Philadelphia*, 262 Pa. 439. The weight of authority, however, inclines to the view that experts are treated like ordinary witnesses, that they can be compelled to appear in all cases and testify as to such opinions as they have, and that such compulsion is not a taking of their property. *Barrus v. Phaneuf*, 166 Mass. 123, 124; *Stevens v. Worcester*, 196 Mass. 45, 56; *Ex Parte Dement*, 53 Ala. 389, 393; *Flinn v. Prairie County*, 60 Ark. 204, 227; *People v. Conte*, 17 Cal. App. 771, 784; *County Com. v. Lee*, 3 Colo. App. 177, 180; *Dixon v. The State*, 12 Ga. App. 17; *Dixon v. People*, 168 Ill. 179; *O'Day v. Crabb*, 269 Ill. 123, 132; *Burnett v. Freeman*, 125 Mo. App. 683; *State v. Bell*, 212 Mo. 111, 126; *State v. Teipner*, 36 Minn. 535; *Main v. Sherman Co.*, 74 Neb. 155; *People v. Montgomery*, 13 Abb. Pr. Rep. (N. S.) 207, 238; *Summers v. State*, 5 Tex. App. 365, 377; *Philler v. Waukesha Co.*, 139 Wis. 211; Wigmore on Evidence (2nd ed.), Vol. IV, § 2203; Rogers on Expert Testimony (2nd ed.), § 188; 2 A. L. R. 1576.

In *Stevens v. Worcester*, 196 Mass. 45, 56, the court, in holding that a witness who had already testified to facts within his knowledge could be compelled to express an expert opinion, if he had one, said: —

The auditor rightly ruled that the witness Eddy, being upon the stand, could be required to express an opinion, if he had one, and that he could not be compelled to study the case or perform labor in order to qualify him to express an opinion. As the witness had formed an opinion which he had committed to a paper which he had with him on the stand, the requirement that he should take the paper in his hand and examine it, to refresh his recollection, was not different in substance or legal effect from a requirement that he should use his mental faculties in listening to a question and in reflecting upon it, in order to give a proper answer. . . . It was not like a requirement that he should study a treatise on a scientific subject.

In *Barrus v. Phaneuf*, 166 Mass. 123, 124, 125, the court, strongly intimating that it had power to compel attendance of expert witnesses, said:—

We should be slow to admit that the court would be without power to require the attendance of a professional or skilled witness, upon a summons duly served, and with payment of the statutory fees, although he was unacquainted with the facts, and could testify only to opinions; but such power would hardly be exercised unless, in the opinion of the court, it was necessary for the purposes of justice. . . . Even in such case the court would probably be without the power to compel the witness to make a study of the case beforehand, or to pay attention to the body of evidence introduced by the parties with a view to forming an opinion thereon. It would seem that one who is summoned as an expert would perform all that the court could require of him if he should hold himself in readiness to be called upon to testify to such opinions as he might have, when his turn should come.

I am therefore of the opinion, in the light of the authorities, that in this Commonwealth professional or skilled witnesses may, in the trial of all causes, be compelled to appear and give their expert opinions, if they have any, even though they have no knowledge of the facts pertaining to the issue involved and have had no connection with the case. It follows that State police officers, officers of the Commonwealth whose salaries are fixed by law, and employees of the Commonwealth receiving regular compensation therefrom, may not receive any fee or compensation for testifying before any court or trial justice in a cause in which the Commonwealth is a party.

In many cases, however, the testimony of an expert would be valueless if his opinion were not based upon some study of the case beforehand or upon some previous examination or observation of the defendant. In many cases where the defence is based upon insanity the prosecuting officer requires the assistance of a psychiatrist in the preparation of the case and in the examination of witnesses. Though an expert can be compelled to testify to such opinions as he may have when he is called to the stand, he cannot be

compelled to make any previous study of the case or to render any assistance or even to listen to other testimony. In cases, therefore, which require preparation or prior study, or where assistance other than the mere testimony of the witness is desired, officers and employees of the Commonwealth designated in G. L., c. 262, § 56, may receive *from counties* compensation for services which they are not by law compelled to render. Such compensation is not a "witness fee" within the meaning of the act.

Where such services are to be paid for from the treasury of the Commonwealth a different situation arises. G. L., c. 29, § 31, provides, in part, that "salaries payable by the commonwealth . . . shall be in full for all services rendered to the commonwealth by the persons to whom they are paid." That act prohibits a person, receiving a salary from the Commonwealth, from accepting any other compensation from the Commonwealth for any services rendered during the usual hours of employment in the salaried position which he occupies. Such person may not accept another salaried position from the Commonwealth, even though the work of the second office might be done outside of the usual hours of employment of the first office. See G. L., c. 30, § 21. He may, however, receive from the Commonwealth additional compensation for special services performed outside of the usual working hours of his position and not required in the performance of the duties of his position. See also, II Op. Atty. Gen. 21 and 309; V Op. Atty. Gen. 697, 698.

Persons receiving salaries from the Commonwealth may, therefore, not receive any additional compensation from the treasury of the Commonwealth for special services rendered as experts, unless such services are performed outside of the usual working hours of their employment and are not required in the performance of the duties of the positions which they hold.

CONSTITUTIONAL LAW — LIBERTY OF CONTRACT — EQUAL
PROTECTION OF THE LAWS — BOSTON ELEVATED RAIL-
WAY COMPANY — EASTERN MASSACHUSETTS STREET
RAILWAY COMPANY.

Legislative power to secure the public safety, health and morals cannot be contracted away.

Certain bills, if enacted, would be unconstitutional, for reasons stated.

A bill forbidding the employment of aliens by the Boston Elevated Railway Company, if enacted, would be an infringement of liberty of contract and arbitrarily discriminatory and would therefore be unconstitutional.

A bill requiring the Eastern Massachusetts Street Railway Company to maintain and keep in repair the portion of highways occupied by its tracks, if enacted, would be arbitrarily discriminatory, and therefore unconstitutional.

On behalf of the committee on rules you have asked my opinion as to the constitutionality of several bills, now pending before the committee, relating to the Boston Elevated Railway Company or to the Eastern Massachusetts Street Railway Company.

To the
House of Rep-
resentatives.
1924
January 25.

In recent years the opinion of the Attorney-General has on several occasions been required on questions concerning the constitutionality of proposed laws relating to the management and operation of those companies, and involving a consideration of the application and effect of Spec. St. 1918, c. 159, and Spec. St. 1918, c. 188. See VI Op. Atty. Gen., 146, 396; VII Op. 11. In these opinions the Attorney-General rules that the provisions in each of those statutes giving to the trustees the right to regulate and fix fares and to determine the character and extent of the service and facilities to be furnished constituted contracts between the Commonwealth and the companies concerned which could not be impaired without violating their constitutional rights, and that a number of the bills submitted would, if enacted into law, be unconstitutional because they contained provisions which would directly impair the contractual rights given by the two special statutes of 1918.

With respect to Spec. St. 1918, c. 159, the court has held, in *Boston v. Treasurer and Receiver General*, 237 Mass. 403, 413, that the statute, having been accepted by the Boston

Elevated Railway Company, constitutes a binding agreement between the company and the Commonwealth, according to its terms, and that it is constitutional. The court points out that the terms of the act are contractual in their nature, as is plain not only from the general scope of the act but from the express provision, in section 18, that "the provisions which define the terms and conditions under which, during the period of public management and operation, the property owned, leased or operated by the Boston Elevated Railway Company shall be managed and operated by the said trustees, and the provisions of section thirteen, . . . shall constitute a contract binding upon the Commonwealth."

But the right of the companies to insist that the contractual obligations of the Commonwealth with respect to the powers and duties of the trustees shall not be impaired by new legislation is not violated by the legitimate exercise of legislative power in securing the public safety, health and morals, since the governmental power of self-protection cannot be contracted away. *New York & New England R.R. Co. v. Bristol*, 151 U. S. 556, 567. The limits of this power of which the Legislature cannot divest itself are not clearly defined. It is not co-extensive with the police power of the State. The right to regulate fares of transportation companies may be affected by contract with the State. *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 325; *Minneapolis v. Minneapolis St. Ry. Co.*, 215 U. S. 417; III Op. Atty. Gen. 396. An instructive discussion of the subject appears in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660-673.

I will now state my opinion in regard to the specific bills which you have submitted.

1. *Petition that the Boston Elevated Railway Company be prohibited from employing aliens while under the period of public management and control.*

The bill accompanying the petition is as follows: —

AN ACT FORBIDDING THE EMPLOYMENT OF ALIENS BY THE BOSTON
ELEVATED RAILWAY COMPANY.

SECTION 1. No person shall be employed by the Boston Elevated Railway Company during the period while under the public management and control provided by chapter one hundred and fifty-nine of the Special Acts of nineteen hundred and eighteen, who is not a citizen of the United States.

SECTION 2. This act shall not apply to the employment of any alien who at the time of its passage is in the service of such company, provided that such alien makes the primary declaration of intention to become a citizen of the United States within ninety days thereafter.

The right to purchase or to sell labor is part of the liberty of contract protected by the Fourteenth Amendment to the Constitution of the United States, which cannot be interfered with by a State beyond the limits of reasonable regulation, in the exercise of its police power. The amendment protects the right of the employer as well as of the employee, and the employer is equally entitled to rely upon its provisions. *Lochner v. New York*, 198 U. S. 45, 53; *Adair v. United States*, 208 U. S. 161, 173-175; *Coppage v. Kansas*, 236 U. S. 1, 14; *Adkins v. Children's Hospital*, 261 U. S. 525, 545; *Opinion of the Justices*, 208 Mass. 619; *Opinion of the Justices*, 220 Mass. 627; *Commonwealth v. Boston & Maine R.R.*, 222 Mass. 206; *Bogni v. Perotti*, 224 Mass. 152.

A statute prohibiting the employment of aliens in common occupations has been held to be repugnant to the Fourteenth Amendment, under which an alien who is lawfully an inhabitant of a State is entitled to the equal protection of its laws. *Truax v. Raich*, 239 U. S. 33; *cf. Opinion of the Justices*, 207 Mass. 601.

Statutes providing for the giving of preference to citizens of States and for discrimination against aliens in employment on public works by a State or a political subdivision thereof have been held to be constitutional, by application of the principle that a State, having control of its own affairs, has the right to prescribe the conditions upon which it will permit public work to be done on its behalf or on

behalf of its municipalities. *Heim v. McCall*, 239 U. S. 175, 191-193; *Crane v. New York*, 239 U. S. 195; *Lee v. Lynn*, 223 Mass. 109.

The Boston Elevated Railway Company, however, is not a governmental subdivision of the State; it is only a public service corporation. To such corporations the protection of the Fourteenth Amendment in respect to the employment of labor was extended in several of the cases cited above. It is my opinion that the proposed law, if enacted, would be unconstitutional because it would deprive the railway company, and aliens employed or seeking employment by it, of that liberty of contract with respect to labor, which is protected by the Fourteenth Amendment.

The proposed law, in my judgment, is objectionable, also, because it applies to the Boston Elevated Railway Company alone, and is arbitrarily discriminatory, and denies to that corporation the equal protection of the laws, in violation of the Fourteenth Amendment. Legislation applicable to a particular class will be sustained if a reasonable basis for the distinction can be found; but it will not be sustained where the distinction or discrimination is purely arbitrary. Classifications and distinctions must be based upon some sound reason. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558-560; *International Harvester Co. v. Missouri*, 234 U. S. 199, 210-215; *Truax v. Raich*, 239 U. S. 33, 39-43; *Tanner v. Little*, 240 U. S. 369; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 555-557; *Buchanan v. Warley*, 245 U. S. 60, 73-81; *Commonwealth v. Interstate, etc., St. Ry. Co.*, 187 Mass. 436, 438, 439; *Commonwealth v. Hana*, 195 Mass. 262, 266-268; *Commonwealth v. Titcomb*, 229 Mass. 14; *Massachusetts General Hospital v. Belmont*, 233 Mass. 190, 200-202; V Op. Atty. Gen. 56. Where a statute is directed against a particular corporation it may still be justified as founded upon a reasonable classification, and so not in violation of the right to equal protection of the laws. *Railroad Co. v. Richmond*, 96 U. S. 521, 529. It is sometimes supported as an exercise of the power to amend the charter of the

corporation. *New York & New England R.R. Co. v. Bristol*, 151 U. S. 556, 567; *Selectmen of Brookline, petitioners*, 236 Mass. 260, 270-272; *cf. Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 536, 544. But such a statute will be held to be unconstitutional if the selection is arbitrary and unreasonable. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 102-112. See, also, *McLean v. Arkansas*, 211 U. S. 539, 551. In my opinion, to single out the Boston Elevated Railway Company and apply to it a regulation prohibiting the employment of aliens would, on its face, be unfair and arbitrary, and would violate the company's constitutional rights.

The measure seems to be objectionable for the additional reason that it is an impairment of the company's contractual right, given by Spec. St. 1918, c. 159, to have its property managed and operated by the trustees, not justified as a reasonable exercise of the power of the State to secure the health, morals or safety of its people. Proper management and operation of the road might be seriously interfered with by such a regulation. On this account, also, I must hold the proposed law to be unconstitutional.

2. *Petition that the board of trustees of the Boston Elevated Railway Company be required to advertise for bids on certain contracts.*

The bill accompanying the petition is as follows: —

AN ACT REQUIRING THE BOARD OF TRUSTEES OF THE BOSTON ELEVATED RAILWAY COMPANY TO PUBLICLY ADVERTISE FOR BIDS ON CERTAIN CONTRACTS.

The board of trustees of the Boston Elevated Railway Company shall advertise in two or more daily newspapers published in Boston for sealed proposals for all construction work or materials involving an expense of more than . . . dollars, stating the time and place for opening such proposals and reserving the right to reject any and all proposals. At the time and place advertised for the opening of proposals all bona fide bidders shall be admitted.

Whether a general statute requiring street railway companies to advertise for bids for construction work or materials

would be unconstitutional, as an unwarranted interference with the right of such corporations to make contracts and carry on their business, as formulated and defined in cases already cited, need not now be determined. See *Prudential Ins. Co. v. Cheek*, 259 U. S. 530. In my opinion, the proposed law would be unconstitutional because in its particular application to the Boston Elevated Railway Company it imposes upon that corporation a burden not borne by other corporations of a similar class, and therefore denies to it the equal protection of the laws; and also because such a provision would be in violation of the contractual right, with respect to the management and operation of the company's property, established by Spec. St. 1918, c. 159.

3. *Petition that the Boston Elevated Railway Company be directed to remove the subway entrances and exits at Scollay Square and Adams Square in the city of Boston.*

The bill accompanying the petition is as follows: —

AN ACT TO COMPEL THE BOSTON ELEVATED RAILWAY COMPANY TO
ABOLISH THE PRESENT ENTRANCES AND EXITS TO THE SCOLLAY
SQUARE AND ADAMS SQUARE SUBWAY STATIONS.

The Boston elevated railway company is hereby directed to remove on or before January 1, 1925, the present subway entrances and exits at Scollay Square and Adams Square in the city of Boston.

This legislation is apparently proposed as an exercise of the power to enforce regulations to secure the public safety, which in other cases has been held valid. *New York & New England R.R. Co. v. Bristol*, 151 U. S. 556; *Baltimore v. Baltimore Trust Co.*, 166 U. S. 673; *New Orleans Gas Co. v. Drainage Commission*, 197 U. S. 453; *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583; *Denver & R. G. R.R. Co. v. Denver*, 250 U. S. 241. Whether it is required for that reason is for the General Court to determine. If, however, the Boston Elevated Railway Company has no title or right in the premises giving it the power to remove the subway entrances and exits referred to in the bill, obviously it cannot be compelled by the Legislature to effect such

removal. I had supposed that the title to these entrances and exists was in the city of Boston, and that the Boston Elevated Railway Company had no right which would entitle it to act. As to that question I am not sufficiently advised to give an authoritative opinion.

4. *Petition that the Boston Elevated Railway Company be directed to maintain toilets in the stations of the company.*

The bill accompanying the petition is as follows: —

AN ACT DIRECTING THE BOSTON ELEVATED RAILWAY COMPANY TO MAINTAIN TOILETS IN THE STATIONS OF THE COMPANY.

The Boston elevated railway company shall keep and maintain reasonable toilet facilities for both men and women on all stations maintained by said railway company which shall be kept open at all times, that said railway station is kept open, for the convenience of its patrons.

The questions presented by this bill are similar to those presented by the bill last considered. Some such provision may be supported as a health measure, the need for which may be found by the General Court to justify the regulation. Whether the company has sufficient control of the premises occupied by its stations to be able to carry out the requirements of the bill is a matter about which I am not advised. I would suggest, also, that the meaning of the word "station" is somewhat indefinite, and that it might be construed to extend to any structure maintained for the protection of passengers while waiting for the company's cars.

5. *Petition that the Eastern Massachusetts Street Railway Company be compelled to maintain and keep in repair the portion of highways occupied by its tracks.*

The bill accompanying the petition is as follows: —

AN ACT TO COMPEL THE EASTERN MASSACHUSETTS STREET RAILWAY COMPANY TO MAINTAIN AND KEEP IN REPAIR THE PORTION OF HIGHWAYS OCCUPIED BY ITS TRACKS.

SECTION 1. During the period of public operation of the Eastern Massachusetts Street Railway Company under the provisions of chapter one hundred and eighty-eight of the Special Acts of nineteen hundred

and eighteen and acts in amendment thereof and supplementary thereto, the Eastern Massachusetts Street Railway Company shall keep in repair to the satisfaction of the superintendent of streets, street commissioners, road commissioners or surveyors of highways, or the division of highways of the department of public works, in the case of state highways, or the metropolitan district commission, in the case of metropolitan boulevards, the paving, upper planking or other surface material of the portions of streets, roads and bridges occupied by its tracks; and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks, and shall be liable for any loss or injury that any person may sustain by reason of the carelessness, negligence, management and use of its tracks.

SECTION 2. When a party upon the trial of an action recovers damages of the commonwealth or of a city or town for an injury caused to his person or property by a defect in a street, highway or bridge occupied by the tracks of said company, if said company is liable for such damages, and has had reasonable notice to defend the action, the commonwealth, city or town may recover of the said company, in addition to the damages, all costs of both plaintiff and defendant in the action.

SECTION 3. This act shall take effect upon its passage.

My opinion was asked last year regarding the constitutionality of a measure, in some respects similar, relating to the Boston Elevated Railway Company. (VII Op. Atty. Gen. 11.) In response to that request I stated my opinion to be that the bill, if enacted into law, would be constitutional, and an act was passed (St. 1923, c. 358) substantially identical with the bill which was referred to me.

As I pointed out in that opinion, St. 1897, c. 500, amending the charter of the Boston Elevated Railway Company, contained in section 10 a provision, in substance, that for a period of twenty-five years the company should not be subjected to taxes or excises not *then* in fact imposed upon street railways, with an exception not now material, nor any other burden, duty or obligation not imposed by general law on all street railway companies, but during that period should pay taxes imposed by general law as if it were a street railway company, and also an additional tax; and this provision was always regarded as a contract between

the State and the company. At the time this statute was enacted street railway companies were required to keep in repair the portions of streets and bridges occupied by their tracks; but in the following year, by St. 1898, c. 578 (see G. L., c. 63, §§ 61-66), that obligation was discontinued, and the companies were required instead to pay an additional excise tax for the benefit of municipalities in which they were operating, to be applied to the construction, repair and maintenance of public ways. The Boston Elevated Railway Company was excepted from the operation of the act, doubtless because of the contract contained in St. 1897, c. 500, § 10, relieving it, for the period named, of the burden of taxes imposed by subsequent legislation. The proposed law seemed to me to violate no right given or protected by Spec. St. 1918, c. 159, and to be otherwise free from constitutional objection, because it merely continued the obligation under which the Boston Elevated Railway Company had operated for many years, and continued, also, the exemption of that company from liability to pay those taxes which in the case of other companies had been substituted for the obligation to keep in repair.

The Eastern Massachusetts Street Railway Company was organized under Spec. St. 1918, c. 188, with all the powers and privileges of a street railway company organized under general laws, so far as applicable. Section 20 of said act provides, in part, as follows: —

The new company, during the continuance of the war and for a period of two years thereafter, shall not be required, except with the express approval of the public service commission after a hearing, to pay any part of the expense of the construction, alteration, maintenance or repair of any street, highway or bridge or any structure maintained or placed therein or thereon, or of the abolition of any grade crossing or the removal of wires from the surface of any street or highway to an underground conduit or other receptacle, and shall not, without such approval, be required directly or indirectly to make any payment or incur any expense whatsoever for or in connection with the construction, alteration,

maintenance or repair of any street, highway or bridge, or the abolition of any grade crossing or the removal of wires: . . .

In my opinion of last year I stated my view to be that the law then under consideration violated no rights given or protected by Spec. St. 1918, c. 159. In my judgment, it is even more clear that the proposed law, as to which you have asked my opinion, violates no rights given or protected by Spec. St. 1918, c. 188. There is, however, a much more serious question whether the proposed law, if enacted, would not be so arbitrarily and unreasonably discriminatory as to violate the company's constitutional rights. The Eastern Massachusetts Street Railway Company has always been and now is subject to the excise tax first laid by St. 1898, c. 578, the object of which is to recompense municipalities, either wholly or in part, for the expense of the construction, maintenance and repair of public ways through which their lines run. The bill does not purport to free the Eastern Massachusetts Street Railway Company from that burden; but that company is singled out as one which is to be required not only to pay the tax imposed for the purpose of providing funds for the repair of roads, as I have explained, but also to keep in repair a portion of those ways. Unless there is some reasonable basis for this discrimination the bill cannot be sustained. No reasonable ground is apparent to me. On the face of the bill as it appears before me I must therefore advise you that, in my opinion, it would be unconstitutional if enacted.

VETERAN — SETTLEMENT — "ACTUALLY RESIDED."

Under St. 1922, c. 177, the place of settlement of a person inducted into the military forces of the United States under the Federal Selective Service Act is the place where he "actually resided" or was living at the time of his induction, as distinguished from the place of legal residence or domicile.

You request my opinion in regard to the legal settlement of a discharged veteran of the World War upon the basis of the following facts: A man who had a derivative settlement in Lynn, through his mother, moved with his family to Marlborough on December 29, 1915. In 1917 he deserted his family and went to West Springfield Street, Boston, to live. While living at 232 West Springfield Street, Boston, he enrolled for the draft and was inducted at Boston, July 22, 1918, giving at that time as his residence 573 Essex Street, Lynn, Mass. For three or four days prior to his induction he was visiting his brother in Lynn at that address. On July 18, 1918, four days prior to the date of his induction, he was living (according to the statement of the Marlborough overseers) in Boston. On November 23, 1918, he was honorably discharged from the service. His family have remained at all times in Marlborough.

On the basis of the above facts you request my opinion as to whether, under St. 1922, c. 177, he acquired a military settlement at:

(1) The place at which he was visiting his brother at the time of his induction into the military service, and which he gave as his residence at that time, *i.e.*, Lynn; or

(2) The place of residence of his wife and children since 1915, *i.e.*, Marlborough;

(3) "The actual place of his residence at the time of enrollment for the draft and . . . from which he was inducted," *i.e.*, Boston.

That portion of St. 1922, c. 177, applicable to the present situation reads as follows: —

Any person who was inducted into the military or naval forces of the United States under the federal selective service act, . . . whether he served as a part of the quota of the commonwealth or not, . . . shall be

To the Com-
missioner of
State Aid and
Pensions.
1924
January 25.

deemed to have acquired a settlement in the place where he actually resided in this commonwealth at the time of his induction or enlistment.

. . .

The settlement of the soldier in question was, therefore, the "place where he actually resided in this commonwealth at the time of his induction." The question presented is as to the proper construction of the words "actually resided."

It is well settled that the word "resided," as used in statutes relative to the acquisition of a settlement in this Commonwealth, means, "domiciled." *Stoughton v. Cambridge*, 165 Mass. 251; *Palmer v. Hampden*, 182 Mass. 511; *Whately v. Hatfield*, 196 Mass. 393.

In my opinion, however, the phrase "actually resided" connotes something different from *legal* residence, in the strict sense of domicile.

The phrase "actually resided" first appears in the present connection in St. 1870, c. 392, § 3. St. 1865, c. 230, conferred a settlement upon a soldier who had been enlisted and mustered as a part of the quota of a town, who was an inhabitant of that town and had resided therein six months before his enlistment. St. 1868, c. 328, struck out the requirement that the soldier should have been a resident of the town for six months. St. 1870, c. 392, § 3, struck out the requirement that the soldier should have been an inhabitant of the town of whose quota he formed a part. Section 5 of the same act provided that any person who would otherwise be entitled to a settlement under the third section of the act, but who was not a part of the quota of any city or town, should, if he served as a part of the quota of the Commonwealth, "be deemed to have acquired a settlement in the city or town where he actually resided at the time of his enlistment." As is pointed out in *Brockton v. Uxbridge*, 138 Mass. 292, 296, in striking out the need for inhabitancy in the town of whose quota the soldier formed a part, section 3 of St. 1870, c. 392, proceeded upon the theory that the town received the benefit of his military services and should therefore bear the burden of his military

settlement, even though he was not an inhabitant; that is, even though he was not legally domiciled in that town or, presumably, even within the Commonwealth. By similar reasoning the fifth section of the act may be presumed to have gone on the theory that if the Commonwealth received the benefit of his military services some town within the Commonwealth should bear the burden of his military settlement, even though he was legally domiciled outside of Massachusetts; and that the proper town upon which to impose this burden was the one in which the soldier had "actually resided" at the time of his enlistment.

In 1919 the Legislature inserted into the law as it then stood a provision in regard to the military settlement of soldiers inducted into the military service of the United States during the World War (Gen. St. 1919, c. 333, § 5). In so doing, the phrase "actually resided" was again employed. It is to be presumed that that phrase, as applied in the act of 1919 to soldiers inducted under the draft, had the same significance that it had in the existing law as applied to soldiers who voluntarily enlisted. The provision as to the settlement of soldiers inducted under the draft during the World War was re-enacted, with minor modifications, as G. L., c. 116, § 1, par. 5; and finally as St. 1922, c. 177. As has been stated above, it is the true meaning of the phrase "actually resided," in this act, that is the subject of the present inquiry.

In addition to the reason, supplied by a study of its legislative history, for believing that the phrase "actually resided" means something other than "was domiciled," that belief is supported by a number of cases which distinguish between the conception of "actual residence," on the one hand, and "legal residence" or "domicil," on the other. *Bradley v. Frazer*, 54 Ia. 289; *Tipton v. Tipton*, 87 Ky. 243; *Fitzgerald v. Arel*, 63 Ia. 104; *In re Brannock*, 131 Fed. 819; *Michael v. Michael*, 34 Tex. Civil App. 630. See, also, *Martin v. Gardner*, 240 Mass. 350, and cases cited at the foot of page 353.

In my opinion, "actually resided" is used in St. 1922, c. 177, in contrast, on the one hand, to *legal* residence, *i.e.*, domicile; and on the other, to the situation suggested by such phrases as "temporarily sojourning," "merely visiting," etc., *i.e.*, mere physical presence. It means the place in which at the time of his enlistment the soldier was actually *living*, in contradistinction to the place in which he merely happened to *be*; and apart from any question of his intentions as to the future.

Applying this interpretation of the phrase "actually resided" to the facts supplied by you, it seems clear that the soldier in question acquired a legal settlement in Boston at the time of his induction into the military service. The question is, of course, purely one of fact in each instance. Treating, however, as I must, the case put by you as one to be determined upon the facts as stated, no other conclusion seems possible in view of the statements that the soldier "went to West Springfield Street, Boston, to live"; that "while living at 232 West Springfield Street, Boston, he enrolled for the draft and was inducted at Boston, July 22, 1918"; that he was merely "visiting his brother . . . in Lynn three or four days prior to his induction"; and that "Boston (was) the actual place of his residence at the time of enrollment for draft."

SAVINGS BANKS — DIVIDENDS.

A savings bank is not required, even if its earnings are sufficient, to pay a regular dividend of five per cent.

You request my opinion on this question: Should not a savings bank be obliged to pay regular dividends out of current earnings for a period of twelve months, up to the five per cent limitation, before it can pay an extra dividend or permit the profit and loss and guaranty fund to exceed ten and one-quarter per cent?

G. L., c. 168, § 47, provides :—

The income of such corporation, after deducting the reasonable expenses incurred in the management thereof, the taxes paid, and the amount set apart for the guaranty fund, shall be divided among its depositors, or their legal representatives, at times fixed by its by-laws, in the following manner: an ordinary dividend shall be declared every six months from income which has been earned, and which has been collected during the six months next preceding the date of the dividend, except that there may be appropriated from the earnings remaining undivided after declaration of the preceding semi-annual dividend an amount sufficient to declare an ordinary dividend at a rate not in excess thereof; but the total dividends declared during any twelve months shall not exceed the net income of the corporation actually collected during such period, except upon written approval of the commissioner. Dividends may be declared oftener than every six months as provided in section seventeen of chapter one hundred and sixty-seven. . . . Ordinary dividends shall not exceed the rate of five per cent a year. No ordinary dividend shall be declared or paid except as above provided, . . .

G. L., c. 168, § 50, provides: —

Whenever the guaranty fund and undivided net profits together amount to ten and one quarter per cent of the deposits after an ordinary dividend is declared, an extra dividend of not less than one quarter of one per cent shall be declared on all amounts which have been on deposit for the six months, or not less than one eighth of one per cent on all amounts which have been on deposit for the three months, preceding the date of such dividend, and such extra dividend shall be paid on the day on which the ordinary dividend is paid; but in no case shall the payment of an extra dividend as herein provided reduce the guaranty fund and undivided profits together to less than ten per cent of the deposits.

In my opinion, the meaning of these two sections, so far as pertinent to your inquiry, is as follows: A savings bank may not declare an "extra" dividend in addition to an "ordinary" dividend unless its guaranty fund plus its undivided net profits, *after* deducting the amount of the ordinary dividend, amounts at least to ten and one-quarter per cent, and exceeds ten per cent by at least the amount of the proposed extra dividend. In other words, a savings bank is not authorized to declare a one-half per cent extra dividend unless, after deducting the amount of the "ordi-

nary" dividend declared by it, its guaranty fund plus undivided net profits equals ten and one-half per cent of its deposits.

There is nothing in the various changes and modifications of G. S., c. 57, § 147, and St. 1876, c. 203, §§ 14 and 16, which have resulted in G. L., c. 168, §§ 47 and 50, nor in the present wording of that act, to suggest that a savings bank which, for example, in a given period has made a net profit of four and one-half per cent, and which has on hand its full five per cent guaranty fund and five per cent net profits in addition, is compelled to declare a four and one-half per cent "ordinary" dividend or is prohibited from declaring instead an "ordinary" dividend of four per cent followed by an "extra" dividend of one-half per cent.

I am therefore constrained to answer the question propounded by you in the negative.

SCHOOL PUPILS — TRANSPORTATION — CLASSIFICATION OF PUPILS ENTITLED TO REDUCED FARE ON STREET RAILWAYS.

With the exception of pupils in private schools and colleges which furnish a more advanced form of education than the equivalent of a public high school course, and pupils of a single class conducted independently without reference to other groups or classes having a common management, pupils who attend the public schools or private schools whose curriculum is similarly limited and pupils of vocational schools subject to G. L., c. 74, are entitled to the special rate of fare on street or elevated railways provided by G. L., c. 161, § 108.

To the Com-
missioner of
Education.
1924
January 31.

You request my opinion upon certain matters relating to the transportation of school pupils under the provisions of G. L., c. 161, § 108.

Under the provisions of the statutes prior to St. 1906, c. 479, the requirement of a half fare rate on street railways had been applied by the Legislature only as to pupils of the public schools. This was extended by the said chapter to include the pupils of private schools as well.

In the case of *Commonwealth v. Connecticut Valley St. Ry.*

Co., 196 Mass. 309, decided in 1907, the Supreme Court construed the meaning of the word "pupils," as used in the statute of 1906, with relation to other provisions of the laws then in force, and determined that the meaning of the word "pupils," as used in the statute, with relation to public and private schools, was confined to the children and youths who attended the public day schools, including the high schools, set forth in R. L., c. 42, §§ 1, 2, 4 and 8 (now G. L., c. 71, §§ 1-5), and private schools which corresponded in their educational scope with such public day and high schools. Colleges, technical and professional schools of more advanced learning were said by the court not to be within the contemplation of the act.

The limitations upon the subjects to be taught in the most advanced of the public schools are set forth now in G. L., c. 71, §§ 1-5, substantially as they were at the time of the court's decision as to R. L., c. 42, § 1, and only private schools whose curriculum is similarly limited come within the purview of G. L., c. 161, § 108. If a private secondary school furnishes no more advanced educational facilities than those which are substantially the equivalent of the training provided by the public high schools, its pupils will be entitled to the lower rate of fare set forth in the statute. The pupils of a college, which presumably furnishes a more advanced form of education than the equivalent of a high school course, will not be entitled to the lower rate of fare.

St. 1910, c. 567, added to the school pupils enumerated in preceding statutes, who were to be carried at a lower rate of fare than other passengers, those of "industrial day or evening schools organized under the provisions of chapter five hundred and five of the acts of the year nineteen hundred and six and acts in amendment thereof," and the present act has substituted for this latter designation that of pupils of "vocational schools subject to chapter seventy-four of the General Laws."

Chapter 74, under the heading "Vocational Schools,"

section 1, defines "vocational education" as "education of which the primary purpose is to fit pupils for profitable employment." It further defines "agricultural education," "industrial education" and "household arts education" as forms of vocational education. It would follow, then, that a pupil in any school provided for by chapter 74 and devoted to agricultural, industrial or household arts education, was a pupil of a vocational school within the meaning of G. L., c. 161, § 108, and was entitled to the advantages of the requirement as to lower fares.

An "independent household arts school," provided for by chapter 74, is defined in the first section of the chapter as "a vocational school," and its pupils are likewise to be included in the terms of G. L., c. 161, § 108.

A "part time class," provided for by chapter 74, is defined by the first section of the chapter as "a vocational class in an industrial, agricultural or household arts schools," and the pupils attending such a class are clearly entitled to the benefit of the reduced fare.

An "independent industrial, agricultural or household arts school," provided for by chapter 74, is defined in the first section as being for all the types of vocational training defined in the section, and its pupils are clearly within the terms of G. L., c. 161, § 108. The same considerations apply to an independent agricultural school mentioned in chapter 74.

Under the heading of "Vocational Schools," section 1 of chapter 74 defines "evening class," in an industrial school, a class giving instruction for pupils employed during the working day, and which, to be called vocational, must deal with and relate to the day employment. . . ." Even if the instruction which the pupil receives in the class is not, by reason of its failure to relate to the pupil's day employment, such as to be called "vocational," nevertheless, as the class itself is conducted in an industrial school, a school which by the definitions of the statute is engaged in the

general course of giving vocational education, the pupils may fairly be said to be pupils of a vocational school and so be entitled to the benefits of the statute.

A "practical art class," provided for by this chapter, is defined as "a separate day or a separate evening class in household and other practical arts." A "household arts education" has already been defined in the first section of the chapter as a form of vocational training, and if such practical art class be held in connection with one of the schools connected with the arts already referred to, the pupil is entitled to the benefit of the statute. If such a class, however, provided for by section 14 of chapter 74, be formed and conducted independently of any of the schools mentioned in the chapter, the attendants upon such classes can hardly be said to be "pupils of vocational schools," and in such case would not be entitled to the benefits of the statute. A single class conducted without reference to other groups or classes having a common management is not the equivalent of a "school."

Schools such as are mentioned in section 15 of chapter 74 would seem to fall within the classification of vocational schools if their primary purpose be to give education to fit pupils for profitable employment. If such be not the primary purpose of any one of such schools, then such school cannot be said to be a "vocational school" within the meaning of chapter 161 and its pupils would not be entitled to the lower fare.

These instances appear to cover the various kinds of schools and classes which may be formed or maintained under the provisions of chapter 74, with the exception of those schools which are expressly referred to by name in the statute and explicitly declared to be "vocational." As to the status of pupils of such schools, there can be no doubt but that they are entitled to the reduced fare.

With the exception of the two instances above noted, the various types of pupils comprehended by the act would

seem to fall fairly under the designation of pupils of vocational schools, and as such to be entitled to the lower rate of fare.

CONSTITUTIONAL LAW — MEMBERSHIP IN POLITICAL COMMITTEES — POLICE POWER.

Membership in a political committee belonging to a political party is not a public office, and may properly be regulated by the Legislature in the exercise of the police power.

A bill providing that State committees shall consist of one committeeman and one committeewoman from each senatorial district and a number of members at large, would be constitutional, if enacted.

To the Joint
Committee on
Elections.
1924
February 6.

I have the honor to acknowledge receipt of your communication in behalf of the joint committee on election laws, requesting my opinion whether or not House Bill No. 473, if enacted into law, would be constitutional.

Section 1 of the bill, which presents the constitutional question to which your inquiry relates, amends section 1 of G. L., c. 52, relative to political committees, by striking out, in the fifth line, the word "member" and inserting the words "committeeman and one committeewoman," so that the first paragraph will read as follows: —

Each political party shall, at the primaries before each biennial state election, elect a state committee, the members of which shall hold office for two years from January first next following their election and until their successors shall have organized. Said committee shall consist of one committeeman and one committeewoman from each senatorial district, to be elected at the state primaries by plurality vote of the members of his party in the district, and such number of members at large as may be fixed by the committee, to be elected at the state convention.

By section 2 of the bill, G. L., c. 53, § 34, as amended, relative to the form of ballots to be used at primaries, is further amended by adding a provision that names of candidates for State committeemen and for State committeewomen shall be arranged alphabetically under separate designations.

If membership in a political committee were a public

office we should be confronted at the outset by the grave constitutional question whether the provision requiring the election of one committeeman and one committeewoman from each senatorial district did not violate article IX of the Bill of Rights, by which it is declared that "all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." Since the adoption of the Nineteenth Amendment to the United States Constitution this provision assures to both men and women, otherwise qualified, an equal right to hold public office as well as to vote. "Now that the word 'male' as a limitation upon the right to vote has been eliminated from the Constitution of Massachusetts, and the suffrage is thrown open to all citizens, all express limitation upon eligibility for office founded upon sex, created or recognized by the Constitution, disappears." *Opinion of the Justices*, 240 Mass. 601, 608, 609. A requirement as to particular public offices, that they shall be filled according to a sex distinction, although resulting in a division of offices of a certain class between men and women equally, or by any method of apportionment, would seem to be wholly inconsistent with the rule thus enunciated; but as to this I am not called upon to express a formal opinion.

It is, however, settled that membership in a political committee belonging to a political party is not a public office. The duties of the position do not involve in their performance the exercise of any portion of the sovereign power. "The fact that the Legislature has deemed it expedient to regulate by statute the election and conduct of political committees does not make the office a public one. The members of them continue to be, as before, the officers of the party which elects them, and their duties are confined to matters pertaining to the party to which they belong, and which alone is interested in their proper performance." *Attorney General v. Drohan*, 169 Mass. 534, 536; V Op. Atty. Gen. 614.

The Constitutions both of the United States and of the Commonwealth contain no mention of political parties or of political committees thereof. No peculiar constitutional safeguards surround such organizations or persons connected with them. The validity of legislation affecting them depends upon ordinary constitutional principles. Political committees may properly be regulated by the Legislature in the exercise of the police power; and any such regulation will be valid unless it trenches upon the political rights of voters secured by the Constitution of Massachusetts, or unless, because it is arbitrary or unreasonable, it offends against the fundamental constitutional guaranties of due process of law and equal protection of the laws contained in the Fourteenth Amendment to the United States Constitution and corresponding provisions of our State Constitution. *Cole v. Tucker*, 164 Mass. 486; *Jaquit v. Wellesley*, 171 Mass. 138, 143; *Commonwealth v. Rogers*, 181 Mass. 184, 186, 187; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 478; V Op. Atty. Gen. 614. The Legislature has a wide discretion in the enactment of laws for the promotion of the general welfare. They are invalid only if they are arbitrary or inappropriate to the end in view or contain some classification or discrimination which is unreasonable. *Commonwealth v. Interstate, etc., St. Ry. Co.*, 187 Mass. 436; *Commonwealth v. Strauss*, 191 Mass. 545, 553; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 478; *Commonwealth v. Libbey*, 216 Mass. 356; *Commonwealth v. Tilcomb*, 229 Mass. 14; *Lawton v. Steele*, 152 U. S. 133, 137; *Tanner v. Little*, 240 U. S. 369. Every rational presumption must be made in favor of the validity of such legislation, if enacted. *Perkins v. Westwood*, 226 Mass. 268; *Attorney General v. Pelletier*, 240 Mass. 264, 298, 299.

We come now to the specific question whether the provision that a State committee shall consist of *one committeeman* and *one committeewoman* from each senatorial district is unconstitutional.

The statute today provides for the election of one member

from each senatorial district. The proposed law provides for the election of a committeeman and a committeewoman from each senatorial district. The regulation does not affect the right to hold public office or the right to vote for public officers. The distinction which it makes creates no political inequality, nor does it seem to interfere with the legal rights of any person in such a way as to deny to him the equal protection of the laws. An analogy may be found in laws requiring the separation of white and colored persons in matters unconnected with the right to hold public office or vote for public officers. Such laws, when the distinction is a reasonable one, in view of the purpose contemplated, have been held not to violate the Fourteenth Amendment, because it was not intended by that amendment to prohibit all distinctions based upon color. *Plessy v. Ferguson*, 163 U. S. 537, 544; *Pace v. Alabama*, 106 U. S. 583; *Berea College v. Kentucky*, 211 U. S. 45. See also, *Civil Rights Cases*, 109 U. S. 3. The proposed act provides for an equal proportion of men and women to be elected to the State committee from each senatorial district. This, it may be presumed, corresponds roughly to the proportion of men and women qualified to vote for delegates. It cannot be said as a matter of law, in my judgment, that if the Legislature, in its discretion, deems that it is expedient so to regulate by statute the election of political committees, this regulation would be arbitrary and unreasonable. My opinion, therefore, is that the bill, if enacted, would be constitutional.

STATE ARMORIES — ARMORERS AND ASSISTANT ARMORERS
— APPOINTMENT AS SPECIAL POLICE.

There appears to be no provision of law authorizing the appointment of armorers and assistant armorers in State armories as special police officers.

To the Adjutant General.
1924
February 9.

You request my opinion "as to the method of procedure for securing the appointment of armorers and assistant armorers as special police officers," and I assume that you mean to inquire as to the possibility of such appointment.

I am unaware of any provision in the General Laws or amendments thereto, with certain exceptions not here applicable, which authorizes such appointment. Special statutes for specific municipalities have from time to time been enacted authorizing the appointment of special police officers under certain circumstances and for certain purposes. Whether armorers may be appointed as special police officers in a given community depends upon the special act applicable to that community.

As a guide to an interpretation of some of the special acts relating to special police officers I refer to the legislation affecting the city of Boston. There the Police Commissioner may appoint special police officers only under St. 1898, c. 282, § 2, and amendments thereof, which provides:—

Said board may, if it deems it expedient, on the application of any corporation or person that said board may deem responsible, appoint special police officers to serve without pay from said city, and the corporation or person applying for an appointment under this section shall be liable for the official misconduct of the officer appointed on such application, as for the torts of any servant or agent in the employ of such corporation or person.

The "corporation or person" referred to in the act is the corporation or person employing the individual sought to be appointed as a special police officer. It seems apparent that an armorer may not be appointed a special police officer in Boston, since the Commonwealth is neither a

corporation nor a person, within the meaning of the act, and no officer of the Commonwealth can by such application impose any liability upon it for the armorer's misconduct.

As a further guide to a consideration of the effect of other special acts I refer also to St. 1898, c. 282, § 3. That section provides, in part: —

Every special police officer appointed under the provisions of this act . . . shall have the power of police officers to preserve order and to enforce the laws and ordinances of the city in and about any park, public ground, place of amusement, place of public worship, wharf, manufactory or other locality specified in the application. . . .

In the matter of making arrests a special police officer is confined strictly to the powers given by the statutes creating his position and relating thereto. *Hull v. Boston & Maine R.R.*, 210 Mass. 159. Section 3 does not give a special police officer the full powers enjoyed by the regular police force of Boston. His powers thereunder are limited to the preservation of order and the enforcement of the laws and ordinances of the city. They could not, except with respect to the preservation of order, be exercised in armories, since armories are specifically placed under the care and control of officers of the Commonwealth and are not subject to local regulation. I Op. Atty. Gen. 290; II Op. Atty. Gen. 399; IV Op. Atty. Gen. 537.

I refrain from considering at this time what would be the respective powers of a special police officer and a commanding officer under G. L., c. 33, § 51. Such consideration may not be necessary under any existing law. I do not pass on the desirability of uniting civil and military authority in the same person, as that is beyond my province.

•

INSURANCE — RIGHT OF DOMESTIC MUTUAL COMPANIES
TO TRANSACT LAWFUL FORMS OF BUSINESS IN ADDITION
TO THOSE SPECIFIED IN THEIR CHARTERS — AUTHORITY
OF COMMISSIONER OF INSURANCE.

The Commissioner of Insurance does not possess a discretion as to issuing or withholding an express license to a domestic mutual company to transact a lawful form of insurance business in addition to those specified in its charter and additional to those mentioned in G. L., c. 175, § 47. If the proposed form of insurance business is lawful, and the terms and conditions for its transaction, laid down by the Commissioner, are complied with, the company is entitled to such express license as a matter of right.

To the Com-
missioner of
Insurance.
1924
February 12.

You have asked my opinion whether you have discretion either to grant or to refuse a license to a domestic mutual company to transact the business of insuring against loss of use and occupancy caused by strikes and sabotage, which is a kind of business not specified in its charter or agreement of association and not included among the purposes for which an insurance company may be incorporated; or whether you are limited in your discretion to the determination of the terms and conditions under which such business shall be carried on.

G. L., c. 175, § 47, enumerates the kinds of business for the doing of which companies may be incorporated under the Massachusetts insurance law. Section 54 provides :—

No domestic mutual company shall transact any other kind of business than is specified in its charter or agreement of association, except that it may in addition transact the kinds of business specified below by reference to the several clauses of section forty-seven, as follows:

(g) Any form of insurance not included in the provisions of section forty-seven; provided, that such form of insurance is not contrary to law and shall be transacted only upon express license of the commissioner and upon such terms and conditions as he may from time to time prescribe.

The question is whether the right given to a domestic mutual company by G. L., c. 175, § 54, (g), to transact, in addition to the kinds of business specified in its charter

or agreement of association, "any form of insurance not included in the provisions of section forty-seven," is so limited by the proviso that it shall be transacted only upon express license of the Commissioner as to depend upon the exercise of the Commissioner's discretion whether he will grant or refuse a license, or whether the Commissioner's power is restricted to determining whether the proposed business is lawful and prescribing the terms and conditions under which such business may be transacted. In determining this question we must consider what authority was intended to be conferred on the Commissioner of Insurance by G. L., c. 175, § 54, (*g*).

The kinds of business which a domestic insurance company might be organized to do were prescribed by statute in 1872, and have been defined and limited since that time. The Legislature during this period always reserved to itself the power to pass on the advisability of the kinds of insurance that should be written, and enacted laws with appropriate restrictions. This policy was followed until 1920, at which time there were left but a few relatively unimportant kinds of insurance, with the result that the Legislature enacted a blanket clause, St. 1920, c. 327, § 2, now found in two places, to wit, G. L., c. 175, § 51, (*g*), and § 54, (*g*). To interpret these clauses as giving the Commissioner of Insurance an absolute discretion, from which no appeal may be taken, to determine what kinds of business insurance companies may transact would be saying that the Commissioner has complete authority to determine the extent of an insurance company's corporate powers. If it had been the intention of the Legislature to vest such an absolute discretion in the Commissioner, and to depart from its long-established policy, it would have said so in plain and unmistakable language. The language of the act seems to indicate a contrary intention. In my opinion, G. L., c. 175, § 54, (*g*), confers upon domestic mutual companies the right, subject to certain conditions, to transact any form of insurance not included in the provisions of section 47 which is

not contrary to law, and this right may not be taken away from them by the Commissioner even in the exercise of a sound and reasonable discretion.

I am accordingly of the opinion that the Commissioner of Insurance has no discretion either to grant or to refuse a license for forms of insurance which are not contrary to law, and that his discretion is restricted to determining whether the proposed business is lawful and to prescribing the terms and conditions under which such business may be transacted.

PLANT PEST CONTROL — NURSERIES — ABATEMENT OF NUISANCE.

The director of the Division of Plant Pest Control has no authority to abate a nuisance caused by the presence of gypsy or brown tail moths in land separated from a nursery by a public highway, but has such authority when the nuisance is caused by the presence of other serious insect pests.

To the Com-
missioner of
Agriculture.
1924
February 14.

You request my opinion whether the director of the Division of Plant Pest Control has any authority to act under G. L., c. 128, §§ 24 and 28, in a case where land immediately across the road from land occupied by a nursery is badly infested with injurious insects, especially gypsy moths. I assume that you use the word "nursery" as synonymous with a place "where nursery stock is grown."

G. L., c. 128, § 24, provides, in part, that "the director, either personally or through his assistants, may inspect any orchard, field, garden, roadside or other place where trees, shrubs or other plants exist, whether on public or private property, which he may know or have reason to suspect is infested with the San Jose scale or any serious insect pests or plant disease, when in his judgment such pests or disease are likely to cause loss to adjoining owners," and may take steps to abate the nuisance.

Section 28 of the act provides: —

Sections sixteen to twenty-seven, inclusive, twenty-nine and thirty, shall not apply to gypsy or brown tail moths in any stage of development

except upon places where nursery stock is grown and upon property immediately adjoining the same.

The determination of your question depends upon the meaning of the words "adjoining" and "immediately adjoining" as used in the act. The prime meaning of the word "adjoining" is to lie next to or to be in contact with, excluding the idea of any intervening space. *Yard v. Ocean Beach Association*, 49 N. J. Eq. 306; *Century Dictionary*; *Standard Dictionary*. The word "adjoining" is, however, also used in the sense of adjacent, along, fronting, near, close by, and similar words. *Mathews v. Kimball*, 70 Ark. 451; *Alexander v. Big Rapids*, 76 Mich. 282; *Akers v. United New Jersey R.R.*, 43 N. J. L. 110; *Northern Pacific Ry. Co. v. Douglas County*, 145 Wis. 288. When the word is used in statutes relating to particular acts or circumstances the meaning must often be gathered from the context and the general intention of the particular statute in which it is used, and if property is the general subject of the enactment the situation and nature of the property sought to be included or excluded by the use of the word must be taken into account. *Spaulding v. Smith*, 162 Mass. 543; *Devoe v. Commonwealth*, 3 Met. 316; *St. Mary's Woolen Mfg. Co. v. Bradford Co.*, 14 Ohio C. Ct. 522; *State v. Downes*, 59 N. H. 320.

The substance of G. L., c. 128, § 24, first appeared in St. 1907, c. 321, § 4, which was made applicable to trees, shrubs or other plants "close by." The word "adjoining" appeared for the first time in St. 1909, c. 444, and was continued in the General Laws. The title of the 1909 act is, in part, "to provide for the protection of trees and shrubs from injurious insects and diseases." It seems clear both from the context and the title of the 1909 act that the Legislature did not intend to narrow the power conferred in the 1907 act, and that it used the word "adjoining" in the sense of "close by," as used in the 1907 statute. If the word "adjoining" in section 24 were given its primary meaning of "being in contact with," no effect could be given to the word "im-

mediately" in section 28, yet it is plain that the Legislature did not regard the words "immediately adjoining," in section 28, as synonymous with "adjoining" in section 24.

Taking into consideration, therefore, the purpose sought to be accomplished and the intent of the Legislature as shown by the title of the act and by the use of the words "adjoining" and "immediately adjoining" in the same statute, I am of the opinion that the word "adjoining" as used in section 24 means adjacent, close by or near, and that the words "immediately adjoining" as used in section 28 mean touching at some point. I am accordingly of the opinion that the director has authority, under G. L., c. 128, § 24, to take action with respect to plant disease or insect pests, other than gypsy or brown tail moths, when in his judgment the disease or pests are likely to cause loss to owners close by, even though the respective lands do not touch at any point, and that with respect to gypsy or brown tail moths he has no authority to act except upon places where nursery stock is grown or upon property immediately touching a nursery at some point.

You do not advise me as to the precise nature of the road which lies between the nursery and the infested land, but I assume that it is a public highway. Even though the fee of both owners may extend to the middle of the road and the nursery and the infested land thus legally touch one another, I am of the opinion that this is not the sort of contact contemplated by section 28. See *Spaulding v. Smith*, 162 Mass. 543.

Your question should therefore be answered in the negative so far as gypsy or brown tail moths are concerned, and in the affirmative with respect to other injurious insects.

FORFEITURE OF CLUB CHARTER — INTOXICATING LIQUORS — “CONVICTION.”

A charter of a club may be declared void by the Secretary of the Commonwealth only after conviction of a person for exposing and keeping for sale or selling intoxicating liquor on the club premises.

Only a final judgment is such conviction.

A plea of guilty and the placing of the case on file does not constitute such conviction.

A charter of a club may not be declared void upon conviction for maintaining a common liquor nuisance.

You request my opinion whether, under the provisions of G. L., c. 138, § 76, you have authority to declare void the charter of a club described in G. L., c. 180, § 2, when its manager pleaded guilty to keeping and exposing intoxicating liquor for sale on the premises occupied by it and his case was placed on file, and he further pleaded guilty to maintaining a common liquor nuisance on its premises and was fined \$100, which he paid.

G. L., c. 138, § 76, provides, in part: —

If any person is convicted of exposing and keeping for sale or selling intoxicating liquor on the premises occupied by any club or organization described in section two of chapter one hundred and eighty . . . the selectmen of the town, or the aldermen of the city, in which such club or organization is situated, except Boston, and in Boston, the licensing board, shall immediately notify the state secretary, and he shall, upon receipt of such notice, declare the charter of said club void, . . .

The term “conviction” has been used in two different senses in our statutes. In one use it signifies a plea of guilty or a finding by the jury that the defendant is guilty. In another use it signifies a final judgment and sentence of the court upon a verdict or confession of guilt. *Attorney General v. Pelletier*, 240 Mass. 264, 310; *Munkley v. Hoyt*, 179 Mass. 108, 109; *Commonwealth v. Kiley*, 150 Mass. 325, 326; *Commonwealth v. Lockwood*, 109 Mass. 323; *Commonwealth v. Gorham*, 99 Mass. 420, 422.

Where the statute provided that the conviction of a person licensed to sell intoxicating liquors shall of itself make the

To the
Secretary.
1924
February 19.

license void, the court, in holding that a final judgment was necessary, said, in *Commonwealth v. Kiley*, 150 Mass. 325, 326:—

Under this provision, the effect of a conviction of the kind named is to deprive the defendant of a valuable right, without an opportunity for further trial or investigation. We are of opinion that nothing less than a final judgment, conclusively establishing guilt, will satisfy the meaning of the word "conviction" as here used.

Two of my predecessors have held that the term "conviction," in statutes providing that licenses shall be void upon conviction, meant a final judgment. IV Op. Atty. Gen. 157; V Op. Atty. Gen. 401.

I am of the opinion that the instant case is governed by the rule laid down in *Commonwealth v. Kiley*, *supra*, and expressed in the opinions referred to, and that the charter of a corporation may be declared void under the provisions of G. L., c. 138, § 76, only after final judgment. The plea of guilty to the charge of keeping and exposing intoxicating liquors for sale and the placing of the case on file do not constitute a final judgment, and are not, in my opinion, a conviction within the meaning of section 76.

The corporation's manager pleaded guilty to maintaining a common liquor nuisance and paid a fine upon that plea. This constituted a final judgment, but is not one of the offences enumerated in section 76 as a basis for declaring the charter of the club void. A person may be guilty of that offence without exposing and keeping for sale or selling intoxicating liquor. See G. L., c. 138, § 82.

I therefore advise you that you have no authority under G. L., c. 138, § 76, to declare the charter of the club void.

BOSTON ELEVATED RAILWAY COMPANY — PUBLIC CONTROL
— DIVIDENDS “EARNED AND PAID.”

Payments by the Commonwealth to the Boston Elevated Railway Company under Spec. St. 1918, c. 159, § 11, are to be treated as earnings in determining whether said railway company has “earned and paid” dividends within the meaning of G. L., c. 168, § 54, cl. 4th.

You ask to be advised whether or not the Boston Elevated Railway Company, in receiving the amounts due to it under the provisions of Spec. St. 1918, c. 159, and in paying therefrom and from its other receipts dividends to its stockholders, as provided by that act, has “earned and paid” such dividends, within the meaning of that phrase in G. L., c. 168, § 54, cl. 4th.

To the
Department of
Public Utilities.
1924
February 20.

The first two paragraphs of G. L., c. 168, § 54, cl. 4th, read as follows:—

SECTION 54. Deposits and the income derived therefrom shall be invested only as follows:

Fourth. In the bonds of any street railway company incorporated in this commonwealth, the railway of which is located wholly or in part therein, and which has earned and paid in dividends in cash an amount equal to at least five per cent upon all its outstanding capital stock in each of the five years last preceding the certification hereinafter provided for by the department of public utilities or its predecessors except the six months' period beginning July first and ending December thirty-first, nineteen hundred and sixteen. No such investment shall be made unless said company appears from returns made by it to the said department to have properly paid said dividends without impairment of assets or capital stock, and said department shall annually on or before June fifteenth certify and transmit to the commissioner a list of such street railway companies.

Dividends paid by way of rental to stockholders of a leased street railway company shall be deemed to have been earned and paid by said company within the meaning of this clause, provided that said company shall have annually earned, and properly paid in dividends in cash, without impairment of assets or capital stock, an amount equal to at least five per cent upon all its outstanding capital stock in each of the five fiscal years preceding the date of the lease thereof.

These two paragraphs of G. L., c. 168, § 54, cl. 4th, re-enacted, without alteration pertinent to the present inquiry, the first and second paragraphs of St. 1908, c. 59, cl. 5th. These, in turn, were based upon St. 1902, c. 483, §§ 1 and 2, which read as follows:—

SECTION 1. In addition to the investments authorized by section twenty-six of chapter one hundred and thirteen of the Revised Laws, savings banks and institutions for savings may invest their deposits and the income derived therefrom in the bonds, approved by the board of commissioners of savings banks, as hereinafter provided for, of any street railway company incorporated in this Commonwealth, the railway of which is situated wholly or partly therein, and which has earned and paid annually for the five years last preceding the certification hereinafter provided for, of the board of railroad commissioners, dividends of not less than five per cent per annum upon all of its outstanding capital stock. In any case where two or more companies have been consolidated by purchase or otherwise during the five years prior to the certification aforesaid the payment severally from the earnings of each year of dividends equivalent in the aggregate to a dividend of five per cent upon the aggregate capital stocks of the several companies during the years preceding such consolidation, shall be sufficient for the purpose of this act. Dividends paid to the stockholders of the West End Street Railway Company by way of rental shall be deemed to have been earned and paid by said West End Street Railway Company within the meaning of this section.

SECTION 2. The board of railroad commissioners shall on or before the fifteenth day of January of each year transmit to the board of commissioners of savings banks a list of all street railway companies which appear from the returns made by said companies to have properly paid, without impairment of assets or capital stock, the dividends required by the preceding section.

Prior to 1902, bonds of street railway companies were not legal investments for saving banks.

The change in the phraseology of the original act, St. 1902, c. 483, §§ 1 and 2, which was made in 1908, followed the recommendation of a legislative committee appointed in 1907 and charged with the duty of suggesting changes in the existing savings bank law. On page 27 of the report of this committee (House Document No. 1280) there appears the following paragraph:—

STREET RAILWAY BONDS.

The committee have recommended no change in the paragraph relating to investments in street railway bonds, but in conformity with the plan followed under the paragraph relating to railroad bonds, they have eliminated the name of the West End Street Railway from the present law, and have provided in general terms for the situation which required its mention.

Such expressions of legislative intent may be considered in construing the act to which they relate. *Binns v. United States*, 194 U. S. 486, 495; *Holy Trinity Church v. United States*, 143 U. S. 457, 464.

The precise legal effect upon the position of the Boston Elevated Railway Company of the so-called "control act" of 1908, Spec. St. 1918, c. 159, has not as yet been definitely determined. The important provisions of that act in regard to the payment of dividends by the Boston Elevated Railway Company are as follows: —

SECTION 6. The trustees shall from time to time, in the manner hereinafter provided, fix such rates of fare as will reasonably insure sufficient income to meet the cost of the service, which shall include operating expenses, taxes, rentals, interest on all indebtedness, such allowance as they may deem necessary or advisable, for depreciation of property and for obsolescence and losses in respect to property sold, destroyed, or abandoned, all other expenditures and charges which under the laws of the commonwealth now or hereafter in effect may be properly chargeable against income or surplus, fixed dividends on all preferred stock of the company from time to time outstanding, and dividends on the common stock of the company from time to time outstanding at the rate of five per cent per annum on the par value thereof during the first two years, five and one half per cent per annum on the par value thereof during the next two years and six per cent per annum on the par value thereof during the balance of the period of public operation. Dividends upon the common shares shall be payable quarterly, but no dividends shall be paid upon such common shares in excess of the rates herein specified. The first payment shall be made at the expiration of six months from the commencement of public operation, and the total of the first three quarterly dividend payments shall be five per cent on the par value of the common stock.

SECTION 9. Whenever the income of the company is insufficient to meet the cost of the service as herein defined, the reserve fund shall be used as far as necessary to make up such deficiency, . . .

SECTION 11. If, as of the last day of June in the year nineteen hundred and nineteen, or the last day of any December or June thereafter, the amount remaining in the reserve fund shall be insufficient to meet the deficiency mentioned in section nine, it shall be the duty of the trustees to notify the treasurer and receiver general of the commonwealth of the amount of such deficiency, less the amount, if any, in the reserve fund applicable thereto, and the commonwealth shall thereupon pay over to the company the amount so ascertained. Pending such payment it shall be the duty of the trustees to borrow such amount of money as may be necessary to enable them to make all payments, including dividend payments, as they become due. . . .

Spec. St. 1918, c. 159, amounted either to a lease of the railway property to the Commonwealth or to a contract for public operation upon stipulated terms. *Boston v. Treasurer and Receiver General*, 237 Mass. 403, 416. Probably the former view is the more satisfactory. *Boston v. Jackson*, 260 U. S. 309, 314. See, also, *Opinion of the Justices*, 231 Mass. 603; V Op. Atty. Gen. 320. In either case, however, in my opinion, the phrase "earned and paid," in the first paragraph of G. L., c. 168, § 54, cl. 4th, quoted above, is broad enough to include both receipts from operation and payments, if any, by the Commonwealth under section 11 of the control act.

The word "earned" is not to be restricted to the dimes and nickels actually collected from passengers. Unquestionably it would include money received under advertising contracts and the like, or under leases of superfluous land or rolling stock. If payments by the Commonwealth under section 11 be regarded as receipts under a contract to make good possible deficiencies, they would seem, therefore, to be included within the meaning of the word "earned." Nor does there seem any sound reason for so restricting

that meaning as to exclude them, even though looked upon as rental from a lease of the entire system.

Two considerations fortify me in this conclusion. R. L., c. 113, § 26, to which St. 1902, c. 483, was in fact, though not in form, an amendment, permitted savings banks to invest in the bonds of railroad corporations which complied with certain requirements. The first paragraph of the third clause of that section was as follows:—

Third, *a.* In the first mortgage bonds of a railroad company incorporated in any of the New England states and whose road is located wholly or in part in the same, whether such corporation is in possession of and is operating its own road or has leased it to another railroad corporation, and has earned and paid regular dividends of not less than three per cent per annum on all its issues of capital stock for the two years last preceding such investment.

Originally (*i.e.*, down to P. S., c. 116, § 20, cl. 3rd), this paragraph read:—

In the first mortgage bonds of any railroad company . . . which is in possession of and operating its own road, and has earned and paid regular dividends . . .

Prior to 1902, however, it had been amended by St. 1889, c. 305, so as to include railroad corporations which “earned and paid regular dividends . . .,” whether such corporation operated its own road or had leased it to another railroad corporation. The fact that, at the time of the adoption of St. 1902, c. 483, the law governing the legality of railroad bonds as savings bank investments had evolved to this point, indicates to my mind that the Legislature, in omitting in the first paragraph of that act any reference to the distinction between leased and operated street railways, intended the test of legality thereby established to apply equally to both.

My opinion is further fortified by the last sentence of St. 1902, c. 483, § 1 (now the second paragraph of G. L., c. 168, 4, § 5 cl. 4th), providing that “dividends paid to the stock-

holders of the West End Street Railway Company by way of rental shall be deemed to have been earned and paid by said West End Street Railway Company within the meaning of this section." The existence of this final sentence, which was added to the original act as an eleventh hour amendment, is explained by the fact that, under the provisions of the lease of the West End Street Railway to the Boston Elevated Railway Company, the Boston Elevated, on stipulated dates in each year, paid directly to the stockholders of the West End Street Railway Company certain stipulated sums per share held. See *West End St. Ry. Co. v. Malley*, 246 Fed. 625, 626. Under such an arrangement it might well have been open to question whether the West End Street Railway Company earned and paid any dividends whatsoever. The amendment was undoubtedly introduced to take care of that situation; and it is to that situation that we must look in interpreting the phrase "dividends paid *by way of rental*" in St. 1902, c. 483, and also, in view of the intention expressed in 1908 to effect no change in existing law, in interpreting that phrase in the second paragraph of G. L., c. 168, § 54, cl. 4th.

The fact, therefore, that the Legislature, in 1902, expressly included a particular leased line among those street railway companies to which S. 1902, c. 483, was applicable, not as an exception to a general rule excluding leased lines, but in order that that particular leased line should not be debarred from the privilege accorded to leased lines in general, because of the short cut method adopted by it for distributing to its stockholders the profits of its lease, seems to me a further indication of the legislative intent that the test of legality established should apply equally to leased and to operated lines. In fact, had St. 1902, c. 483, included operated lines only and excluded in general all leased lines, a provision extending to a particular leased line the privilege denied to all others might well have been open to serious constitutional objections.

It is true that the control act contemplates that the

Boston Elevated Railway Company shall ultimately repay any money paid to it by the Commonwealth. It is to do so, however, only when, and if, its earnings from operation, in addition to covering all operating expenses and dividends, have built up a new surplus exceeding by thirty per cent or more the one million dollar reserve fund originally established. Spec. St. 1918, c. 159, § 11. This provision, therefore, is independent of the Commonwealth's obligation to meet possible deficiencies. It does not in any sense render a payment by the Commonwealth under section 11 a mere loan. Upon such a payment the Boston Elevated Railway Company does not become indebted to the Commonwealth for the amount paid over to it. True, at some future date the Boston Elevated Railway Company may be operating so successfully that it will be required by section 11 to reimburse the Commonwealth. But it is equally true that this desirable condition may never come to pass. Whether it does or not will depend upon the working of the law of demand and supply under new conditions of increased rates of fare. Despite the provision for possible future reimbursements, therefore, whether the consolidation act be looked upon as lease or a contract, payments to the Boston Elevated Railway Company under section 11 properly may be regarded as money "earned" by it.

Accordingly, in my opinion, if the Boston Elevated Railway Company, pursuant to Spec. St. 1918, c. 159, has paid dividends of at least five per cent on all its outstanding capital stock in the years 1919 to 1923, inclusive, and if in each of these years its receipts, including therein both earnings by operation and payments, if any, by the Commonwealth under section 11, have amounted to at least five per cent of the total outstanding capital stock, it has "earned and paid" such dividends during that period, within the meaning of G. L., c. 168, § 54, cl. 4th.

VACCINATION — UNVACCINATED CHILD — ADMISSION TO PUBLIC SCHOOLS — PROOF OF VACCINATION.

Vaccination, in its statutory meaning, is the operation known as vaccination properly performed. A successful operation is not required to constitute vaccination.

An unvaccinated child, within the purview of the statute, is a child upon whom the operation known as vaccination has not been properly performed.

Visible evidence that vaccination has been successfully performed is not a necessary requirement for the admission of a child to a public school.

Proof that a child has been properly vaccinated may be required before admission to a public school.

Mere verbal changes in the revision of a statute do not alter its meaning.

To the Com-
missioner of
Public Health.
1924
February 21.

You have requested my opinion on the following questions:

(1) What constitutes vaccination within the meaning of G. L., c. 76, § 15?

(2) Is it necessary, legally, to have visible evidence that vaccination has been successfully performed?

(3) Inasmuch as the "Goodall" method may or may not produce an immunity, would a certificate from a physician stating that he had vaccinated a child of school age by this method, admit the child as a vaccinated pupil to school?

G. L., c. 76, § 15, provides, in part: —

An unvaccinated child shall not be admitted to a public school except upon presentation of a certificate like the physician's certificate required by section one hundred and eighty-three of chapter one hundred and eleven. . . .

G. L., c. 111, § 183, is, in part, as follows: —

. . . any child presenting a certificate, signed by a registered physician designated by the parent or guardian, that the physician has at the time of giving the certificate personally examined the child and that he is of the opinion that the physical condition of the child is such that his health will be endangered by vaccination, shall not, while such condition continues, be subject to the two preceding sections.

Section 181 provides, in part: —

Boards of health, if in their opinion it is necessary for public health or safety, shall require and enforce the vaccination and revaccination of

all the inhabitants of their towns, and shall provide them with the means of free vaccination. . . .

Section 182 provides for the vaccination of inmates of certain establishments and institutions.

The requirement that children must be vaccinated before they may be admitted to the public schools first appears in St. 1855, c. 414, § 2, which provides that "the school committee of the several towns and cities, shall not allow any child to be admitted to or connected with the public schools who has not been *duly* vaccinated."

Section 4 of that chapter provided for the enforcement of re-vaccination in cities and towns when the public health required it, with the following proviso:—

. . . *provided*, that none shall be required to be re-vaccinated who shall prove, to the satisfaction of said selectmen, or mayor and aldermen, that they have been *successfully* vaccinated, or re-vaccinated, within five years next preceding; . . .

Section 5 of the act provided that inmates of certain establishments and institutions should be "*properly*" vaccinated.

The requirement making vaccination a condition precedent to the right of a child to attend the public schools was modified by St. 1898, c. 496, § 11, which added the words "except upon presentation of a certificate signed by a regular practicing physician that such child is an unfit subject for vaccination." This excepting clause was changed from time to time thereafter until it reached its present form.

The primary definition of the word "vaccination" is "inoculation with vaccine, or the virus of cowpox, as a preventive of smallpox." Century Dictionary; New International Encyclopedia.

"Vaccination" is also defined as "a method of protective inoculation against smallpox, consisting in the intentional transference to the human being of the eruptive disease of cattle, called cowpox." Encyclopedia Britannica.

It is further defined as "a process of transmitting by inoculation a specific disease, known as vaccinia, cowpox or modified smallpox, from one susceptible reagent to another." *Encyclopedia Americana*.

The word "unvaccinated" is defined as "not vaccinated; specifically, having never been successfully vaccinated." *Century Dictionary*.

"Inoculation" is defined as "the introduction of a specific animal poison into the tissue by puncture or other contact with a wounded surface." *Century Dictionary*.

In *Commonwealth v. Jacobson*, 183 Mass. 242, the defendant made an offer of proof, of which, as appears from the record, the ninth proposition was as follows: —

Ninth. That vaccination consists in inoculating the human system with a specific disease, known as cowpox, by means of the insertion into the human body — by incision and absorption — of various kinds of virus, commonly known as matter or pus, generally obtained from cowpox sores upon the bodies of calves (sometimes other animals) which have been infected with this disease for the purpose of generating this virus, pus or matter.

The court said, concerning this proposition, at page 246: —

The ninth of the propositions which he offered to prove, as to what vaccination consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial.

The decision was affirmed and the above remark was quoted with approval in *Jacobson v. Massachusetts*, 197 U. S. 11, 23.

In *Lee v. Marsh*, 230 Penn. 351, the following definition was applied in construing a statute of Pennsylvania: —

The ordinary and usual meaning of "vaccination," and the sense in which it must be supposed to have been used by the legislature, is inoculation with the virus of cowpox for the purpose of communicating that disease as a prophylactic against smallpox. It indicates an operation, and not a result. If a person should take cowpox by milking cows, or

otherwise, or from other contact with the disease he could not be said to have been vaccinated. The operation is comparatively old, having been in use for over 100 years, and during that time has always consisted of inoculating the body, that is, grafting upon it the disease, by inserting the virus under the skin, and the test of its success has always been considered to be the appearance of the symptoms of the disease, including those which manifest themselves on the skin.

In the medical sense, an "unvaccinated" child is generally understood to mean either a child upon whom the operation known as vaccination has never been performed or upon whom it has been performed unsuccessfully.

It thus appears that the word "vaccinated," as generally used, may apply either to the operation itself, whether successful or not, or to the successful operation.

The meaning of the words "vaccinated" or unvaccinated," as used in the statute, must be determined from the context, the general intention of the Legislature and the purpose to be accomplished. *Commonwealth v. Nickerson*, 236 Mass. 281, 290; *Hammond v. Hyde Park*, 195 Mass. 29, 30; *Chapin v. Lowell*, 194 Mass. 486, 488; *Toupin v. Peabody*, 162 Mass. 473, 476; *Sweetser v. Emerson*, 236 Fed. 161, 162.

The original act, St. 1855, c. 414, contains the words "vaccinated," "duly vaccinated," "successfully vaccinated," "properly vaccinated," and "re-vaccinated."

The word "duly" means "in a fit manner; properly; in accordance with what is required or suitable." *Words and Phrases*, vol. 3, p. 2259.

The terms of the act show that the Legislature understood and appreciated the double meaning of the word "vaccinated," and that vaccination did not furnish immunity for life but that re-vaccination might be required at times for the protection of public health. In some instances, I am informed, children, because of natural insusceptibility, can never be successfully vaccinated. An interpretation of the word "vaccinated" as "successfully

vaccinated" would prevent such children from ever attending a public school.

Where the vaccine used is fresh and the operation is properly performed, vaccination, I am informed, will be unsuccessful in a comparatively small number of cases.

Taking all of the foregoing factors into consideration, I am of the opinion that the Legislature, by the use of the words "duly vaccinated," meant the operation known as vaccination properly performed, and did not mean the operation successfully performed.

The words "duly vaccinated" appeared in the statutes from 1855 to the Revised Laws of 1902, when in the codification the word "duly" was omitted. It is also omitted in the General Laws. The requirement of proper vaccination as a condition precedent to admission to a public school nevertheless continues. The general rule is well settled that mere verbal changes in the revision of a statute do not alter its meaning, and the Legislature will not be presumed to have intended to alter the law unless their language plainly requires that construction. *Commonwealth v. N. Y. C. & H. R. R.R. Co.*, 206 Mass. 417, 419; *Great Barrington v. Gibbons*, 199 Mass. 527, 529; *Tilton v. Tilton*, 196 Mass. 562, 564; *Savage v. Shaw*, 195 Mass. 571; *Electric Welding Co. v. Prince*, 195 Mass. 242, 259.

Neither the language of the Revised Laws nor of the General Laws requires a construction that the Legislature intended to alter the law.

I am therefore of the opinion that an "unvaccinated child," within the meaning of G. L., c. 76, § 15, is a child upon whom the operation known as vaccination has not been properly performed.

My answer to your second question is in the negative.

You state that recently a new method of vaccination has been introduced, known as the "Goodall" method, which consists of a hypodermic injection of the virus, leaving no evidence that the operation has been performed. Whether or not such method is vaccination properly per-

formed is a question of fact which is not within my province to determine. The question whether in a given case a child has been properly vaccinated is a question of fact, as to which the proper authorities may require proof.

G. L., c. 76, § 15, states a condition precedent, the non-fulfilment of which is an absolute bar to the right of a child to attend the public schools. But this is not the only statutory provision under which school children may be required to be vaccinated for the protection of the public health. Under the provisions of G. L., c. 111, §§ 181 and 183, boards of health may require and enforce the vaccination and re-vaccination of all the inhabitants of their towns, with the proviso, already referred to, exempting the child presenting a physician's certificate. In addition to this provision there is also the provision in G. L., c. 76, § 5, as follows:—

Every child shall have a right to attend the public schools of the town where he actually resides, subject to the following section, and to such reasonable regulations as to numbers and qualifications of pupils to be admitted to the respective schools and as to other school matters as the school committee shall from time to time prescribe. . . .

It has been held that by virtue of this provision school committees may adopt regulations imposing further requirements with respect to vaccination. *Hammond v. Hyde Park*, 195 Mass. 29; *Spofford v. Carleton*, 238 Mass. 528. With respect to the character of such regulations the only requirement imposed by the statute is that they shall be "reasonable." Whether regulations prescribing methods of vaccination or the submission of proof of successful vaccination would be reasonable I do not undertake to determine.

ELECTIONS — PRESIDENTIAL PRIMARIES — CANDIDATES FOR
DELEGATES TO NATIONAL PARTY CONVENTIONS —
PREFERENCES.

A nomination paper of a candidate for delegate to a national party convention at a presidential primary sufficiently states the preference of the candidate in accordance with G. L., c. 53, § 68, if it bears the words "pledged to . . ."

To the
Secretary.
1924
February 25.

You request my opinion on a question arising out of the performance of your official duties in preparing the official ballot for use in the coming presidential primaries, at which delegates to the national conventions of political parties are to be elected.

G. L., c. 53, § 68, provides, in part, that —

The ballot shall also contain a statement of the preference, if any, of each candidate for delegate as to a candidate for nomination for president, provided that such statement appears in his nomination papers; . . .

You state that nomination papers are now in circulation bearing the words "pledged to . . ."

You ask to be advised as to whether or not the use of the statement in this form is permissible.

The statement is unambiguous, and the words clearly and unmistakably indicate the candidate's preference and choice as to a candidate for nomination for president. In my judgment, the use of such a statement is, as a matter of law, permissible, and a candidate is entitled to have placed upon the ballot such a statement of his preference, upon his complying with the other provisions of said section 68. It is not necessary that the word "preference" shall be used upon a nomination paper if a "statement" unmistakably connoting the same meaning is used.

CONSTITUTIONAL LAW — REARRANGEMENT OF THE CONSTITUTION — ADOPTION OF REARRANGED CONSTITUTION.

Under the Constitution an amendment may be made by initiative petition, by legislative substitute and by legislative amendment.

The Legislature has no power to initiate a new or revised constitution.

The proposed rearrangement of the Constitution is not an amendment but a revision, and cannot, under the Constitution, be submitted to the voters by the Legislature.

You have submitted to me Senate Resolve No. 54 of 1924, and have asked my opinion upon the following questions of law in relation thereto: —

To the Joint
Committee on
Constitutional
Law.
1924
March 4.

1. Is it constitutionally competent for the General Court to act upon the "Resolve to provide that the Rearrangement of the Constitution adopted by the voters in November, nineteen hundred and nineteen, amended to conform to existing law, shall be the Constitution of the Commonwealth" (Senate No. 54), under the provisions of article XLVIII of the amendments to the Constitution or under any other provision of the Constitution?

2. Would the adoption of a revised or rearranged constitution be an amendment of the Constitution of the Commonwealth, within the meaning of article XLVIII of the amendments to said Constitution?

3. May a revised or rearranged constitution be constitutionally adopted in any other manner than through the instrumentality of a constitutional convention?

It is the official duty of the Attorney-General to advise a committee of the Legislature only with respect to such bills as may be actually pending before it. III Op. Atty. Gen. 111; VI Op. Atty. Gen. 147. Cf. G. L., c.12, § 9. The justices of the Supreme Judicial Court, in rendering opinions under Mass. Const., pt. 2d, c. III, art. II, follow a similar rule. *Opinions of the Justices*, 122 Mass. 600; 226 Mass. 607, 612. Your first question relates directly to a measure pending before you, and hence requires full consideration. Your second and third questions are general in form, but you state that they are asked in connection with the pending resolve. For that reason, I shall treat them as incidental to the main inquiry in your first question.

Furthermore, I assume that your questions refer solely

to the authority of the General Court under the existing Constitution and to the operation and effect of that instrument. In response to an inquiry concerning possible methods of amending the Constitution, the justices of the Supreme Judicial Court, in an opinion rendered in 1833 (*Opinion of the Justices*, 6 Cush. 573, 574), said: —

The court do not understand, that it was the intention of the house of representatives, to request their opinion upon the natural right of the people in cases of great emergency, or upon the obvious failure of their existing constitution to accomplish the objects for which it was designed, to provide for the amendment or alteration of their fundamental laws; nor what would be the effect of any change and alteration of their constitution, made under such circumstances and sanctioned by the assent of the people. Such a view of the subject would involve the general question of natural rights, and the inherent and fundamental principles upon which civil society is founded, rather than any question upon the nature, construction, or operation of the existing constitution of the commonwealth, and the laws made under it. We presume, therefore, that the opinion requested applies to the existing constitution and laws of the commonwealth, and the rights and powers derived from and under them.

Accordingly, I discard from consideration all question of the validity of legislative action under altered constitutional conditions, or of the possible efficacy of unauthorized legislative action by virtue of hypothetical future happenings.

I also assume, from the form of your questions and the caption of the resolve, which purports to provide that the rearrangement “shall be the Constitution of the Commonwealth,” that the very essence of the proposed measure is the substitution of a new for an existing constitution, and that the term “revised or rearranged constitution,” as you use it, means such a substituted constitution.

What are the provisions in the existing Constitution for its amendment, revision or rearrangement?

In the Constitution originally adopted there are two references to possible changes. The first is in article VII of the Bill of Rights, providing that —

Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it.

The second is in chapter VI, article X, of the Frame of Government, which provides that —

In order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary, —

the General Court in 1795 shall take steps for the calling of a constitutional convention to consider revising or amending the Constitution.

No convention was called in 1795, as directed by that provision, but in 1820 a convention was held which submitted to the people a number of amendments, of which nine were adopted, becoming the first nine articles of amendment to the Constitution. The ninth amendment provided for amendments to the Constitution, in the following terms: —

If, at any time hereafter, any specific and particular amendment or amendments to the constitution be proposed in the general court, and agreed to by a majority of the senators and two-thirds of the members of the house of representatives present and voting thereon, such proposed amendment or amendments shall be entered on the journals of the two houses, with the yeas and nays taken thereon, and referred to the general court then next to be chosen, and shall be published; and if, in the general court next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of the senators and two-thirds of the members of the house of representatives present and voting thereon, then it shall be the duty of the general court to submit such proposed amendment or amendments to the people; and if they shall be approved and ratified by a majority of the qualified voters voting thereon, at meetings legally warned and holden for that purpose, they shall become part of the constitution of this commonwealth.

Articles X to XLIV, inclusive, of the amendments were adopted under the provisions for amendment made by article IX.

Another constitutional convention was held in 1853. This convention submitted to the people a revised constitution, which was rejected by them.

Articles XLV to LXVI, inclusive, of the amendments were submitted to the people by the Constitutional Convention of 1917, and were adopted at subsequent elections in 1917 and 1918. The forty-eighth amendment repealed the ninth amendment, substituting therefor provisions for amendment by initiative petition as well as by proposals introduced in the Legislature. The sixty-seventh and last amendment was submitted to the people under the provisions for amendment contained in the forty-eighth amendment, and was approved in 1922.

The forty-eighth amendment is known as the Initiative and Referendum Amendment. It begins with the following declaration of principle:—

Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the general court, to the people for their ratification or rejection.

Then follow provisions which are grouped under three general headings: "The Initiative," "The Referendum" and "General Provisions." The provisions relating to constitutional amendments are contained under the heading "The Initiative."

Subdivision II of that heading states the requirements with respect to the contents and mode of originating initiative petitions and their transmission to the General Court, providing that certain excluded matters specified in section 2 shall not be proposed by such a petition. Subdivision III, section 2, provides for the submission to the people of a legislative substitute for any measure introduced by initiative petition. The measures proposed by initiative petitions may be either constitutional amendments or laws.

Subdivision IV is entitled "Legislative Action on Proposed Constitutional Amendments." The provisions of that subdivision are as follows: —

SECTION 1. *Definition.* — A proposal for amendment to the constitution introduced into the general court by initiative petition shall be designated an initiative amendment, and an amendment introduced by a member of either house shall be designated a legislative substitute or a legislative amendment.

SECTION 2. *Joint Session.* — If a proposal for a specific amendment of the constitution is introduced into the general court by initiative petition signed by not less than twenty-five thousand qualified voters, or if in case of a proposal for amendment introduced into the general court by a member of either house, consideration thereof in joint session is called for by vote of either house, such proposal shall, not later than the second Wednesday in June, be laid before a joint session of the two houses, at which the president of the senate shall preside; and if the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending, the governor shall call such joint session or continuance thereof.

SECTION 3. *Amendment of Proposed Amendments.* — A proposal for an amendment to the constitution introduced by initiative petition shall be voted upon in the form in which it was introduced, unless such amendment is amended by vote of three-fourths of the members voting thereon, in joint session, which vote shall be taken by call of the yeas and nays if called for by any member.

SECTION 4. *Legislative Action.* — Final legislative action in the joint session upon any amendment shall be taken only by call of the yeas and nays, which shall be entered upon the journals of the two houses; and an unfavorable vote at any stage preceding final action shall be verified by call of the yeas and nays, to be entered in like manner. At such joint session a legislative amendment receiving the affirmative votes of a majority of all the members elected, or an initiative amendment receiving the affirmative votes of not less than one-fourth of all the members elected, shall be referred to the next general court.

SECTION 5. *Submission to the People.* — If in the next general court a legislative amendment shall again be agreed to in joint session by a majority of all the members elected, or if an initiative amendment or a legislative substitute shall again receive the affirmative votes of at least one-fourth of all the members elected, such fact shall be certified by the clerk of such joint session to the secretary of the commonwealth, who shall submit the amendment to the people at the next state election. Such

amendment shall become part of the constitution if approved, in the case of a legislative amendment, by a majority of the voters voting thereon, or if approved, in the case of an initiative amendment or a legislative substitute, by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such amendment.

By subdivision VIII under the heading "General Provisions" article IX of the amendments to the Constitution is annulled.

By the terms of the provisions quoted above it will be seen that a constitutional amendment may be made in one of three ways, — (1) by initiative petition; (2) by legislative substitute; and (3) by legislative amendment. When the requirements governing the methods of proposal have been complied with, and when the amendment has been approved by the people in accordance with the provisions of section 5, "such amendment shall become part of the constitution."

Aside from the provision in article VII of the Bill of Rights, declaring the right of the people to reform, alter or totally change their government, the only provisions contained in the existing Constitution for making changes therein are in the forty-eighth amendment. This amendment speaks only of *amendments* to the Constitution. If, then, a "revision" or a "rearrangement" of the Constitution means something different from an amendment, there is no provision in the forty-eighth amendment for such a change.

The meaning of the words "rearrangement" and "revision" received careful consideration in *Opinion of the Justices*, 233 Mass. 603, and in *Loring v. Young*, 239 Mass. 349. According to the views there expressed, "rearrangement" means a change in form without change in substance, while "revision" means a change in substance as well as form and contemplates the substitution of the new for the old. The word "amendment," on the other hand, whatever else it may connote, at least implies that one thing is to be altered or added to by another. It presupposes

an existing structure. *Shields v. Barrow*, 17 How. 130, 144; *Gagnon v. United States*, 193 U. S. 451, 457. It contemplates that, upon adoption, the thing so designated shall become a part of that pre-existing structure. An amendment is not a self-supporting entity. It must be an amendment *to* something. It is incapable of existing *in vacuo*.

Both a revision and a rearrangement which substitute a new constitution for the old are essentially different from an amendment. This was the conclusion of the justices in *Opinion of the Justices*, 233 Mass. 603, 609, and in both majority and minority opinions in *Loring v. Young*, 239 Mass. 349, 373, 375, 380, 400. In chapter VI, article X, of the original Constitution the words "revision" and "amendment" are used disjunctively, and in Gen. St. 1916, c. 98, relative to the calling and holding of a constitutional convention, the purpose of the proposed convention is stated to be "to revise, alter or amend the constitution of the commonwealth," and the delegates were authorized to "take into consideration the propriety and expediency of revising the present constitution of the commonwealth, or making alterations or amendments thereof."

I conclude, therefore, that the power to amend the Constitution is different from the power to establish a new constitution superseding and replacing the old. The power to amend the Constitution is the power to add to or alter, but not to supersede. That the power conferred upon the General Court by the forty-eighth amendment to the Constitution is the power to initiate amendments to the Constitution, not to initiate a revision of that Constitution, seems to me beyond question. *Amendments* are to be submitted to the voters; and such amendments are to "become *part of the Constitution* if approved."

Senate Resolve No. 54 is entitled "Resolve to provide that the Rearrangement of the Constitution adopted by the voters in November, nineteen hundred and nineteen, amended to conform to existing law, shall be the Con-

stitution of the Commonwealth"; and purports to propose "articles of amendment" providing that "the Constitution or form of government of the Commonwealth of Massachusetts, adopted in seventeen hundred and eighty, and the sixty-seven articles of amendment thereto, are hereby deemed and taken to be revised, altered and amended by the Rearrangement of the Constitution adopted by the voters at the State election in November, nineteen hundred and nineteen, which is hereby declared to be the Constitution of the Commonwealth of Massachusetts," with certain specified amendments thereto; and that "the Constitution or form of government for the Commonwealth of Massachusetts will then be as follows."

The court held in *Loring v. Young*, 239 Mass. 349, that the Rearrangement of the Constitution submitted to the voters in 1919 contained changes in substance as compared with the Constitution of 1780 and its amendments, that the Rearrangement, however, provided that in case of conflict the old Constitution and its amendments should prevail, that the voters did not intend to adopt a new form of government, and that, accordingly, the old Constitution and its amendments was still the fundamental law. It is this very Rearrangement, set out anew in Senate Resolve No. 54, with some amendments introducing further changes in substance, as to which my opinion is now required.

The proposed resolve is, in my opinion, open to the objection that it is a revision of the Constitution rather than an amendment. Such is the plain purport of the provisions that the so-called "Rearrangement" "is hereby declared to be the Constitution of the Commonwealth of Massachusetts" and that "the Constitution or form of government for the Commonwealth of Massachusetts will then be as follows." It proposes to substitute a new constitution for the old. In my opinion, therefore, this "Rearrangement" is not within the terms of the amending power, as defined in the forty-eighth amendment.

As I have said, the Constitution provides no method for

making changes in it, except as set out in the forty-eighth amendment, unless such provision is to be found in the seventh article of the Bill of Rights. By virtue of this declaration, the court has intimated that "the people of the Commonwealth have under the Constitution the right to alter their frame of government according to orderly methods as provided by law, and through the medium of an act of the Legislature," and that therefore the calling of a constitutional convention may be sanctioned by the Constitution. *Opinion of the Justices*, 226 Mass. 607, 610. See also *Opinion of the Justices*, 6 Cush. 573.

But this does not mean that the Legislature may initiate a revision of the Constitution. It has no inherent power to submit to the people for ratification a new constitution, nor can such a proceeding be supported either by custom or as an orderly method provided by law. See Jameson on Constitutional Conventions, 4th ed., §§ 570 and 574 *h*. The proposing of constitutional amendments or of new constitutions is hardly to be deemed a normal exercise of legislative function, authority for which may be sought and found in the general grant of legislative power under the Constitution. 1 Deb. Mass. Conv. 1820, pp. 405, 407. See Jameson on Constitutional Conventions, 4th ed., §§ 549 and 551. A suggestion has been made that the Legislature, in passing a legislative amendment, should be regarded as a constitutional convention, because the proposal must be acted upon in a joint session of the Legislature. But the distinction between a joint session of the Legislature and a constitutional convention is, to my mind, both clear and fundamental. A constitutional convention is perhaps the most solemn, deliberate and highest assembly which can be convened in this Commonwealth. *Sproule v. Fredericks*, 69 Miss. 898. Constitutional conventions have been held only three times since the adoption of the Constitution in 1780. Delegates are elected to a constitutional convention for the sole purpose of determining whether the Constitution shall be revised, altered or amended. Legis-

lative sessions are held annually. Members of the Legislature are elected for the important purpose of enacting all manner of wholesome and reasonable laws for the general welfare of the people. It was never contemplated that the duties of the two bodies should be merged in the General Court, or that the Legislature, of its own initiative, should have the right to submit a new constitution to the people.

My answer to your first question is therefore in the negative. Reiterating, to avoid the possibility of misunderstanding, that I interpret your questions as referring to the existing Constitution and to the rights and powers derived therefrom, and that by a "revised or rearranged constitution" you mean a new constitution substituted in place of and superseding the constitution now in force, what I have already said covers your second and third questions.

CONSTITUTIONAL LAW — TAXATION OF LEGACIES AND
SUCCESSIONS — UNITING INTERESTS PASSING TO
ONE BENEFICIARY.

A statute amending G. L., c. 65, § 1, as amended, so as to provide that all interests in property passing or accruing to the same beneficiary, by any of the methods therein specified, shall be united and treated as a single interest for the purpose of determining the tax thereunder, would be constitutional.

To the
Governor.
1924
March 22.

You have transmitted to me for examination and report House Bill No. 146, entitled "An Act providing for uniting interests in connection with the taxation of legacies and successions" and reading as follows:—

Section one of chapter sixty-five of the General Laws, as amended by chapter three hundred and forty-seven and by section one of chapter four hundred and three both of the acts of nineteen hundred and twenty-two, is hereby further amended by adding at the end thereof the following new paragraph:—All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder.

G. L., c. 65, § 1, as amended by St. 1922, c. 347 and c. 403, § 1, omitting the table of rates, is as follows: —

All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth or any interest therein and all stock in any national bank situated in this commonwealth or in any corporation organized under the laws of this commonwealth belonging to persons who are not inhabitants of the commonwealth, which shall pass by will, or by laws regulating interstate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A, except a grandchild of the deceased, unless its value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts.

The table of rates gives different percentages, from one per cent to twelve per cent, varying with the value of the property or interest and with the class of relationship.

This section imposes a legacy and succession tax on property and interests therein, subject to the limitations and exceptions therein provided, passing or accruing either (1) by will, or (2) by laws regulating intestate succession, or

(3) by deed, grant or gift made in contemplation of the death of the grantor or donor, or (4) by deed, grant or gift made or intended to take effect in possession or enjoyment after his death, or (5) by survivorship in any form of joint ownership to which the decedent contributed.

In cases which have been before the court the Commissioner of Corporations and Taxation has assessed taxes on property and interests therein passing or accruing to a single person by more than one of the methods specified in section 1, treating the different interests as a whole for the purpose of determining the rate and amount of the tax and the exemption. In *Marble v. Treasurer and Receiver General*, 245 Mass. 504, taxes so assessed upon property passing under a will and an interest in joint savings bank deposits were held to be valid; and in *Pratt v. Dean*, 246 Mass. 300, taxes so assessed upon property passing by will and beneficial interests in trusts created during the testator's lifetime, taking effect in enjoyment after his death, were sustained by the court. In these cases the court intimates that the rule would be different in the case of an interest vesting in enjoyment or possession independently of the death of the donor or testator. Therefore, as the statute now stands it would be doubtful whether a gift made in contemplation of death could be united with property passing in the other ways described in section 1, for the purpose of assessing the tax thereunder. Apparently, also, it would be doubtful whether a future interest could be so united; although in *Moors v. Treasurer and Receiver General*, 237 Mass. 254, taxes which seem to have been assessed in that way were approved. The proposed amendment relieves the uncertainty and provides a uniform rule applicable to all the cases specified in section 1.

In my opinion, the proposed law, if enacted, would be constitutional.

PILOTS — SUSPENSION — REVOCATION OF COMMISSION — “ACTIVE SERVICE.”

Under the statutes, a commissioner of pilots may suspend a pilot whom he finds to be guilty of misconduct, carelessness or neglect of duty, and he may revoke the pilot's commission only with the concurrence of the trustees of the Boston Marine Society.

Under the rules and regulations for pilotage for the Fourth Pilot District a pilot holding a commission for service there may not be suspended except for misconduct, carelessness or neglect of duty.

Such a pilot, if not under suspension or leave of absence, is in active service, and should be assigned to pilotage duty.

You ask my opinion regarding the extent of your powers under St. 1923, c. 390, to suspend or revoke the commissions of pilots in your district and to assign them to duty.

To the Com-
missioner of
Pilots.
1924
April 1.

St. 1923, c. 390, made many important changes in the previous law as to pilots, contained in G. L., c. 103. Section 1 of said chapter 390 strikes out the first fourteen sections of said chapter 103 and substitutes therefor six sections, which provide, among other things, in substance, for the division of the shore line of the Commonwealth into four districts, the appointment of commissioners and deputy commissioners of pilots therefor, the formulation of rules and regulations for pilotage and establishment of rates, the granting of commissions to pilots, their suspension, and the revocation of their commissions.

Under the previous law pilots, except for the harbor of Boston, might be removed only by the Governor and Council. G. L., c. 103, §§ 6-11, 13. This provision was changed by the statute of 1923. G. L., c. 103, § 3, as thus amended, is as follows: —

The commissioners, subject to the approval of the trustees of said society, shall formulate rules and regulations for pilotage and establish rates within their respective districts, . . . The commissioners also, in accordance with such rules and regulations, shall grant commissions as pilots for their districts or for special locations therein, to such persons as they consider competent; provided that for district one such persons shall first be approved by said trustees. The commissioners may, upon satisfactory evidence of his misconduct, carelessness or neglect of duty, suspend any such pilot until the next meeting of said trustees and may

thereafter continue such suspension until the close of the next stated meeting of said trustees, but no longer for the same offense. If said trustees decide at either of said meetings that the commission of such pilot ought to be revoked, the commissioners may revoke it at any time after said decision is rendered and before it is reversed. The commissioners shall cause the laws and regulations for pilotage within their district to be duly observed and executed, and shall receive, hear and determine complaints by and against pilots for said district.

The society therein referred to is the Boston Marine Society, and the trustees are the trustees of that society.

On the subject of commissions of pilots St. 1923, c. 390, § 6, further provides:—

. . . But nothing herein contained shall affect the commissions of pilots of any kind, except that after this act takes effect they may be removed for the causes specified and in the manner provided in section three of said chapter one hundred and three, as amended by this act. . . .

These provisions make it clear that the pilots in your district may be removed and their commissions revoked by the Commissioner in the way, and only in the way, provided by section 3, quoted above. The Commissioner may, upon satisfactory evidence of the misconduct, carelessness or neglect of duty of a pilot, suspend such pilot until the next meeting of the trustees of the Boston Marine Society, and may continue such suspension thereafter until the close of the next stated meeting of the trustees. If the trustees decide at either of those meetings that the commission of the pilot ought to be revoked, the Commissioner may then revoke it. The Commissioner's power, therefore, is limited to suspending, in the first instance, a pilot whom he finds to be guilty of misconduct, carelessness or neglect of duty, and he may revoke the pilot's commission only after the trustees of the Boston Marine Society have decided that the commission ought to be revoked. He has no power to suspend a pilot except upon such a finding.

In the case of *Lunt v. Davison*, 104 Mass. 498, 502, the meaning of the words "misconduct, carelessness or neglect

of duty," as used in a similar statute, was considered by the court, and the court said: —

The causes of removal are very general and indefinite, — "misconduct, carelessness or neglect of duty." It is only requisite that the evidence of either of these should be satisfactory to the commissioners. From the nature of the case, this involves not merely the credibility and sufficiency of the proof of the facts relating to the conduct of the pilot, but also the question whether the facts so proved furnish satisfactory evidence of misconduct, carelessness or neglect of duty. The propriety of the conduct of a pilot, in the performance of his official duties, as observed by the commissioners or shown by evidence brought to them, can be judged of best by men having constant familiarity with the circumstances and requirements of the service. If from neglect, inattention, or any want of faithfulness, the service of a pilot should fall short of that which is due to the responsibilities of the position, we think the terms of the statute would authorize the commissioners to regard that deficiency as satisfactory evidence of carelessness or neglect of duty, although no specific act of misconduct should be alleged.

You have submitted to me a copy of rules and regulations for pilotage for the Fourth Pilot District, formulated and approved as required by said section 3. Rules 1, 23 and 24 are as follows: —

1. All pilots shall hold themselves in readiness for pilotage service at all times, provided, however, that the Commissioner may grant permission for leave of absence from such duty in his discretion.

23. All pilots in active service shall be assigned to pilotage duty by the Commissioner. The work shall be apportioned equally among said pilots, and all income from said pilotage, after deducting the necessary expenses incident to the work of pilotage, shall be equally divided among said pilots every thirty days.

24. Any pilot proven to have violated these regulations, or the state laws which accompany them, except for reasons which meet with approbation of the Commissioner, shall be liable to suspension.

The words "in active service," as used in rule 23 with reference to pilots, naturally designate all pilots not under suspension or leave of absence as provided by rule 1, and

in the absence of information as to a different practical construction I so construe them. It is my judgment that a pilot holding a commission for service in your district may not be suspended by you except for misconduct, carelessness or neglect of duty, and that, since the passage of the statute of 1923 and the adoption of the rules and regulations, such a pilot, if he is not under suspension or leave of absence, is in active service within the meaning of those words as used in rule 23, and should be assigned by you to pilotage duty.

You also ask with respect to a pilot who has been out of active service in local waters for some period of time, whether you have the power to assign him to go along with another pilot of experience, and under his guidance, for a number of trips sufficient to enable him to familiarize himself with any changes which may have occurred in those waters since the time of his last service.

Rule 23 requires you to assign all pilots in active service to pilotage duty. The words "pilotage duty," as used in rule 23, plainly mean the duty of acting as pilot for vessels entering or leaving the waters within the district. See *State v. Turner*, 34 Ore. 173; MacLachlan's Law of Merchant Shipping, 6th ed., p. 207. For performing this service a pilot is entitled to receive pilotage fees. It is no part of the duty of a pilot either to instruct or to receive instruction from another pilot. The powers and duties of pilots and of the Commissioner are determined by the statutes and the rules and regulations, but they contain no provision for the instruction of pilots. I am therefore of the opinion that you have no power to assign the pilot you refer to to serve with and under the guidance of another pilot.

I do not, of course, intimate that the pilot you mention has no duty in the premises. He is by statute made liable for all damages accruing from his negligence, unskilfulness or unfaithfulness. G. L., c. 103, § 18. If, owing to absence, he has become unfamiliar with the waters in his district, it would seem a natural precaution that he should make

himself familiar with them. This duty is well stated in *Atlee v. Packet Co.*, 21 Wall. 839, 396, 397, as follows: —

In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity, his skilled knowledge, very seriously in the course of a long voyage. He should make a few of the first "trips," as they are called, after his return, in company with other pilots more recently familiar with the river.

DISTRICT ATTORNEYS — TRAVELING EXPENSES — OTHER EXPENSES.

Except in Suffolk County, traveling expenses of district attorneys and assistant district attorneys, necessarily incurred in the performance of their official duties, are to be paid by the Commonwealth and not by the county.

All other expenses necessarily incurred are to be paid by the county for the benefit of which they were contracted.

You request my opinion whether traveling expenses of district attorneys and assistant district attorneys are to be paid by the Commonwealth or by the county for the benefit of which they were contracted.

To the Commissioner of
Corporations
and Taxation.
1924
April 7.

G. L., c. 12, § 23, provides: —

Except in the Suffolk district, district attorneys and assistant district attorneys shall receive for traveling expenses necessarily incurred in the performance of their official duties such sums as shall be approved by a justice of the superior court, to be paid by the commonwealth.

Section 24 of the act provides: —

A district attorney, in the name of any county in his district, may contract such bills for stationery, experts, travel outside of the commonwealth by witnesses required by the commonwealth in the prosecution of cases, for necessary expenses incurred by officers under his direction in going outside of the commonwealth for the purpose of searching for or bringing back for trial persons under indictment in said county, and for such other expenses as may in his opinion be necessary for the proper conduct of his office in the investigation of or preparation and trial of criminal causes; and all such bills shall be paid by the county for the benefit of which they were contracted upon a certificate by the district

attorney that they were necessarily incurred in the proper performance of his duty, and upon approval of the auditor of Suffolk county if the bills were incurred for said county, otherwise upon the approval of the county commissioners or of a justice of the superior court.

The two sections must be read together. So read, they clearly differentiate between traveling expenses of district attorneys and assistant district attorneys and other expenses incurred by such officers. Accordingly I am of the opinion that, except in Suffolk County, traveling expenses of district attorneys and assistant district attorneys necessarily incurred in the performance of their official duties are to be paid by the Commonwealth and not by the county. All other expenses incurred by the district attorney, which in his opinion are necessary for the proper conduct of his office in the investigation of or preparation and trial of criminal causes, are to be paid by the county for the benefit of which they were contracted.

BOARD OF REGISTRATION IN PHARMACY — AGENT — POWERS
— INSPECTION OF DRUG STORES — RIGHT TO USE
FORCE — TAKING OF SAMPLES.

The inspection of drug stores, which an agent of the Board of Registration in Pharmacy may make, must be reasonable, with a view to accomplishing the purpose of the statute.

Opening closets, pulling out drawers and examining the contents of cans, jugs and other containers is a reasonable mode of inspection.

Such agent may probably not use force to gain entry to a drug store for the purpose of making an inspection.

If peaceable entry is obtained, an inspection may probably be made against the owner's will.

Right to take samples is not incidental to or part of the right to inspect.

The agent of the Board of Registration in Pharmacy may not take samples without the consent of the person in charge of the store.

On behalf of the Board of Registration in Pharmacy you ask my opinion on questions of law relative to the powers of the agent of that board appointed under G. L., c. 13, § 25, as amended by St. 1922, c. 441. That act reads as follows:—

The board (of registration in pharmacy) shall appoint and fix the compensation, with the approval of the governor and council, of an agent who shall be allowed his necessary traveling expenses. He shall inspect drug stores and make a daily report of his doings pertaining thereto, and report all violations of the laws relating to pharmacy.

Your first question is as follows:

Has the agent the power to open closets, pull out drawers, examine contents of cans, jugs and other containers in a drug store which he is engaged in inspecting?

An inspection is "a strict or prying examination; a close or careful scrutiny; a critical examination; a formal or official inquiry by actual observation into the state, efficiency, safety, quality, etc., of something of special moment, as drugs." Century Dictionary; 32 C.J. 930.

In *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 62, the court said: —

What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test.

An inspection may be very general or it may be very minute. 32 C. J. 930. The manner in which an inspection shall be made depends entirely upon the requirements of the statute and the nature of the merchandise to be inspected. 22 Cyc. 1366. It must be reasonable, of such a nature as to be of value and must have a rational connection with the end to be accomplished. *Commonwealth v. Moore*, 214 Mass. 19.

The statute in question provides that an agent of the Board of Registration in Pharmacy shall inspect drug stores and report all violations of the laws relating to pharmacy. The language of the act is comprehensive; its object is to protect and promote public health. It is manifestly within the police power of the State. *Commonwealth v. Moore*, 214 Mass. 19; *Commonwealth v. Wheeler*, 205 Mass.

384; *Commonwealth v. Carter*, 132 Mass. 12; *Pittsburg & Southern Coal Co. v. Louisiana*, 156 U. S. 590, 599. The inspection which may be made by the agent of the board must be reasonable, with a view to accomplishing the purpose of the statute.

Taking into consideration the foregoing factors, I am of the opinion that opening closets, pulling out drawers and examining the contents of cans, jugs and other containers is a reasonable mode of inspection. Accordingly, I am of the opinion that your first question should be answered in the affirmative.

The agent may, however, probably not use force to gain entry to a drug store for the purpose of making an inspection. The cases sustaining the right of officers authorized by statute to make entry for the purpose of inspection refer to peaceable entry. They do not hold that entry may be made by force against the will of the owner or occupant. Whether such entry would be lawful is left in doubt. See VI Op. Atty. Gen. 288. If, however, peaceable entry to the drug store has been obtained, the court seems to intimate that an inspection can be made even against the will of the owner. *Commonwealth v. Smith*, 141 Mass. 135, 139. This question, however, is not free from doubt.

Your second question is as follows:

Can the agent take a sample of suspected illegal liquor for analysis, for presentation as evidence before the Board of Registration in Pharmacy, without the consent of the person in charge at the store?

The right to take samples is not, in the absence of express authority, incidental to or part of the right to inspect. In *Commonwealth v. Smith*, 141 Mass. 135, 139, the court said:—

The right to take samples of milk against the will of the owner can only be justified by an act of the Legislature regulating a business which otherwise might become injurious to the community.

This right cannot be extended beyond its express scope. *Dunn v. Lowe*, 203 Mass. 516; *Commonwealth v. Smith*, 141 Mass. 135, 139. Wherever in this Commonwealth samples may be taken by inspectors, the right has been expressly conferred by statute. G. L., c. 94, § 304, specifically provides for the furnishing of samples of drugs to an officer or agent of the Department of Public Health upon tender of the value thereof.

G. L., c. 13, § 25, as amended, does not authorize the taking of samples. I am therefore of the opinion that, in the absence of specific authorization, the agent of the board may not take samples, and that your second question should be answered in the negative.

PLUMBERS — APPRENTICE — JOURNEYMAN — PROBATIONARY LICENSE.

A person learning the business of plumbing may not lawfully be sent out to do the work of a journeyman plumber unless he is registered or has been licensed as required by G. L., c. 142, § 3, except that a person who has worked as an apprentice or under a verbal agreement for instruction, for not less than three years, and has complied with the requirements of G. L., c. 142, § 4, may have issued to him a probationary license under which he may be sent out to do the work of a journeyman.

You request my opinion on questions of law arising out of R. L., c. 103, § 9, and St. 1909, c. 536, § 2.

The Revised Laws were supplanted by the General Laws, which took effect from and after December 31, 1920. G. L., c. 282, expressly repeals both R. L., c. 103, § 9, and St. 1909, c. 536, § 2. It is clear that it would serve no useful purpose to discuss questions of law involving the interpretation of statutes that have been repealed. I am, however, going to take the liberty of discussing the questions raised by you in the light of the provisions of the statutes that exist today in our General Laws.

Your first question, revised, would read as follows: Does

To the State
Examiners of
Plumbers.
1924
April 8.

G. L., c. 142, § 14, prohibit an apprentice or learner from working without a license?

Said section 14 reads as follows: —

Sections one to sixteen, inclusive, shall apply to all persons learning the business of plumbing when they are sent out to do the work of a journeyman.

Therefore, section 3 of said chapter 142 applies to persons learning the business of plumbing when they are sent out to do the work of a journeyman plumber. Said section 3 prohibits any person from engaging in the business of working as a journeyman plumber unless he is lawfully registered or has been licensed by the examiners, as provided in this chapter; so that, answering your first question, a person learning the business of plumbing may not be sent out to do the work of a journeyman plumber unless he is lawfully registered or has been licensed.

Your second question, revised, would read as follows: Does the probationary license, as described in and issued under G. L., c. 142, § 4, fill any gap left in G. L., c. 142, §14?

So far as is pertinent to your inquiry said section 4 reads as follows: —

The examiners may, without payment of any fee, issue a probationary license in force for six months to a person who, having worked as an apprentice, or under a verbal agreement for instruction, for not less than three years, presents an application therefor with the signed endorsement of his employer agreeing to be responsible for all work done under the license and to have the licensee, at the expiration of the license, present himself for examination as a journeyman.

Consequently, as the law stands today, a person, having worked as an apprentice or under a verbal agreement for instruction, for not less than three years, and complying with the other requirements set forth above, may have issued to him a probationary license under which he may be sent out to do the work of a journeyman.

METROPOLITAN POLICE OFFICER — EXPENSES AS WITNESS — REIMBURSEMENT.

A metropolitan police officer who attends as a witness in a criminal case at a place other than his residence, and whose attendance is not in the performance of the duties for which he is paid a salary, is entitled to a witness fee.

In all other cases, with certain minor exceptions, the expenses of such officer, necessarily and actually disbursed by him for testifying in a criminal case in the Superior Court, should be paid by the county. If the case is tried in a district court or before a trial justice, such expenses should be paid by the town where the crime was committed.

You request my opinion whether a metropolitan district police officer who, by the order of the district attorney, appeared as a witness in the Superior Court held at Brockton at the trial of a person charged with crime, and who incurred expenses in so appearing, is entitled to be reimbursed by the county where the trial was held.

G. L., c 262, § 50, provides, in part: —

No . . . police officer who receives a salary or an allowance by the day or hour from the commonwealth or from a county, city or town shall, except as otherwise hereinafter provided, be paid any fee or extra compensation . . . for testifying as a witness in a criminal case during the time for which he received such salary or allowance; . . . but his expenses, necessarily and actually incurred, and actually disbursed by him in a criminal case tried in the superior court, shall, except as provided in section fifty-two, be paid by the county where the trial is held . . .

Section 52 provides: —

Except in Suffolk county, the fees and expenses of officers in the apprehension, trial or commitment of a person arrested or tried as a tramp or vagrant shall be paid by the county where the offence was committed.

Section 53 provides, in part, as follows: —

Any officer named in section fifty who attends as a witness at a place other than his residence shall, instead of his expenses, be allowed the witness fee in the court or before the trial justice where he testifies. . . .

In my opinion a metropolitan district police officer is included in the class of persons enumerated in section 50. Sections 56 and 57 have no application to such officer.

To the Metro-
politan District
Commission.
1924
April 9.

In construing R. L., c. 204, §§ 42 and 44, now G. L., c. 262, §§ 50, 53, above referred to, the court said, in *Sackett v. Sanborn*, 205 Mass. 110, 112: —

The object of the statute is to provide that officers who receive compensation for their services by salary or otherwise, and attend court in the discharge of duties which they are thus paid to perform, shall not receive further compensation by way of witness fees, but that any expenses necessarily and actually incurred or disbursed by them in the performance of such duties in attending court in criminal cases shall be reimbursed to them. If they attend court, but *not in the performance of the duties for which they are paid*, at a place other than their residence, then, . . . instead of their expenses they are to be allowed witness fees.

I am accordingly of the opinion that if a metropolitan district police officer attends as a witness at a place other than his residence, and his attendance is not in the performance of the duties for which he is paid a salary or allowance, he is entitled to a witness fee in the court or before the trial justice where he testifies. In all other cases, with the exception of the cases referred to in G. L., c. 262, § 52, the expenses of such officer, necessarily and actually incurred and actually disbursed by him for testifying as a witness in a criminal case tried in the Superior Court, should be paid by the county where the trial is held; and if the case is tried in a district court or before a trial justice, such expenses should be paid by the town where the crime was committed.

CONSTITUTIONAL LAW — UNDERTAKERS — LICENSES — REGISTERED EMBALMERS.

A statute limiting the issuance of undertakers' licenses to registered embalmers would be unconstitutional.

The presumption of constitutionality does not attach to a bill not yet enacted into law.

To the House
Committee on
Bills in the
Third Reading.
1924
April 10.

You request my opinion as to whether House Bill No. 615, with certain changes indicated by you, would be constitutional if enacted into law.

House Bill No. 615 is entitled "An Act to require under-

takers to be registered embalmers," and, with the changes specified in your letter, would read as follows: —

Chapter one hundred and fourteen of the General Laws is hereby amended by striking out section forty-nine and inserting in place thereof the following: — *Section 49.* Boards of health shall annually, on or before May first, license a suitable number of undertakers who can read and write the English language and who shall be registered embalmers. Such license shall be issued upon such terms and conditions as the board of health may prescribe, and may be revoked at any time by the board if its terms or conditions or any requirements of law relative thereto have been violated by the undertaker. An undertaker so licensed may act in any town. Nothing herein contained shall prevent such board from granting a license to any person licensed as an undertaker prior to June first, nineteen hundred and twenty-four.

In *Wyeth v. Board of Health of the City of Cambridge*, 200 Mass. 474, decided in 1919, the Supreme Judicial Court held that a regulation of the Board of Registration in Embalming, requiring all undertakers to be licensed embalmers, was unconstitutional, and that the refusal of the respondents to grant to an applicant a license as an undertaker, solely upon the ground that the applicant was not a licensed embalmer, was an invasion of a constitutional immunity, to redress which a writ of mandamus would issue. In the course of the opinion Knowlton, C. J., speaking for the court, said: —

We can see no such connection between requiring all undertakers to be licensed embalmers and the promotion of the public health as to bring the making of this regulation by the board of registration in embalming, or the refusal of a license by the board of health on account of the regulation within the exercise of the police power by the State. If such a regulation had been made by an act of the Legislature, with all the strong presumptions of constitutionality which attach to legislative action, we should hesitate to affirm the constitutionality of the act. But action by such a board, under mere general authority to make rules and regulations, does not carry with it these strong presumptions. We consider this action without foundation in law or reason, and in violation of the constitutional rights of our citizens.

A statute of New York, which provided, among other things, that no person should engage in the business of undertaking unless he had been

duly licensed as an embalmer, was held unconstitutional by a unanimous decision in the appellate division of the Supreme Court of that State. *People v. Ringe*, 125 App. Div. (N. Y.) 592.

In the face of so clear an intimation of the opinion of the Supreme Judicial Court there appears little room for speculation in the present case. Further, the "strong presumptions of constitutionality which attach to legislative action," referred to in the opinion, are inapplicable to a bill not yet enacted into law. The presumption is justified by the belief that the enactment of a law presupposes that the Legislature, in the light of its own knowledge and of the best legal advice available to it, has determined that authority to pass such a law is included within the powers delegated to it by the Constitution. To invoke the presumption during the consideration of a proposed enactment would be to destroy the very foundation upon which that presumption rests.

I am accordingly constrained to advise you that, in my opinion, House Bill No. 615, with the changes specified by you, if enacted into law would be unconstitutional.

HIGHWAYS — STATE HIGHWAYS — LAYOUT.

Under St. 1922, c. 501, as amended by St. 1923, c. 481, providing for the laying out and construction, by the Division of Highways, of a highway in the city of Revere, the city cannot be required to make the layout, and no part of the cost may be assessed upon the county.

A way does not become a State highway, under G. L., c. 61, until it has been "laid out and taken charge of" by the division in behalf of the Commonwealth.

Since St. 1922, c. 501, as amended, does not require the division to take charge of the proposed highway, it was not intended to provide that the highway should be a State highway.

To the Com-
missioner of
Public Works.
1924
April 14.

You request my opinion as to the proper procedure in laying out the highway authorized by St. 1922, c. 501; and put the three following questions: —

1. Shall it be laid out as a State highway under the provisions of G. L., c. 81?
2. May the division require the city of Revere to make the layout?

3. If laid out as a State highway, can 25 per cent of the cost be assessed upon the county, under the provisions of G. L., c. 81, § 9, as amended by St. 1921, c. 112, § 2, and St. 1923, c. 362, § 63?

St. 1922, c. 501, as amended by St. 1923, c. 481, reads as follows: —

SECTION 1. The division of highways of the department of public works is hereby authorized and directed to lay out and construct a highway in the city of Revere beginning at the Malden line on or near the present way leading from Revere to that part of the city of Malden known as Linden and extending to Broadway in said city of Revere. The route of such layout and construction may be along existing public or private ways or over private land; provided that no work shall be done on the construction of said highway until satisfactory releases have been obtained from the owners for all land to be used for said highway without expense and that the city of Malden shall have made the necessary appropriations and undertaken the construction of connections satisfactory to said division, said connection in Malden to run from the Revere line through Linden square, Beach and Salem streets and over private land to the Newburyport Turnpike.

SECTION 2. For the purposes of this act, the division may expend a sum not exceeding one hundred thousand dollars. Of the total amount expended, one half shall be assessed upon the metropolitan parks district and the balance shall be paid by the commonwealth from item number six hundred and thirty-one of the general appropriation act of the current year.

Section 2 was superseded by St. 1923, c. 494, item 623 *b*, which provides as follows: —

For the construction of a highway in the city of Revere, as authorized by chapter five hundred and one of the acts of nineteen hundred and twenty-two, as amended by chapter four hundred and eighty-one of the acts of the present year, at a cost not exceeding one hundred thousand dollars, one half of which shall be assessed upon the metropolitan parks district, and the balance of fifty thousand dollars shall be paid from Motor Vehicle Fees Fund . . . \$50,000.00

G. L., c. 81, entitled "State Highways," provides, in sections 4 to 12 inclusive, for the laying out of State high-

ways by petition by county commissioners, aldermen or selectmen to the Division of Highways, determination by the division that public necessity and convenience require that the proposed way should be laid out and taken charge of by the Commonwealth, and the filing of a plan and certificate showing that the division has laid out and taken charge of the way in accordance with the plan. Provisions prescribing the method to be followed are contained in sections 4 and 5 as follows: —

SECTION 4. If county commissioners, aldermen or selectmen adjudge that public necessity and convenience require that the commonwealth lay out and take charge of a new or existing way as a highway in whole or in part, in their county, city or town, they may apply, by a written petition, to the division, requesting that said way be laid out and taken charge of by the commonwealth.

SECTION 5. If the division determines that public necessity and convenience require that such way should be laid out or be taken charge of by the commonwealth, it shall file in the office of the county commissioners for the county where the way is situated a certified copy of a plan thereof, a copy of the petition therefor, and a certified copy of a certificate that it has laid out and taken charge of said way in accordance with said plan, and shall file in the office of the clerk of such town a copy of the plan showing the location of the portion lying in each town and a copy of the certificate that it has laid out and taken charge of said highway in accordance with said plan . . .

Section 5 provides that “thereafter said way shall be a State highway, and shall be constructed by the division at the expense of the Commonwealth.”

Section 24 provides as follows: —

The division may, whenever any money is appropriated by the general court for its use in the construction or improvement of any particular way, expend such money in constructing or improving the whole or such part of said way as it deems best, either upon the location of the existing way or upon any new location that may be established by the county commissioners or the selectmen, and no part of the way so improved shall thereby become a state highway or be maintained as such. The division may, however, lay out the whole or any part of any such way as a state highway.

Section 13 provides that "state highways shall be maintained and kept in good repair and condition by the division at the expense of the Commonwealth," and section 18 provides that "the Commonwealth shall be liable for injuries sustained by persons while traveling on state highways, if the same are caused by defects within the limits of the constructed traveled roadway, in the manner and subject to the limitations, conditions and restrictions specified in sections fifteen, eighteen and nineteen of chapter eighty-four," with certain exceptions therein specified. G. L., c. 84, § 1, provides that "highways and town ways shall, unless otherwise provided, be kept in repair at the expense of the town in which they are situated"; and section 15 provides that the "county, city, town or person by law obliged to repair the same" shall be liable in damages for injuries from defects therein.

In view of the plain provisions in St. 1922, c. 501, as amended, authorizing and directing the Division of Highways to lay out and construct the highway in question, and providing for payment of the cost of construction, one-half by the metropolitan parks district and the balance from the motor vehicle fees fund, it is my opinion that the division may not require the city of Revere to make the layout, and that no part of the cost may be assessed upon the county. I therefore answer your second and third questions in the negative.

Your first question, whether the highway shall be laid out as a State highway under the provisions of G. L., c. 81, depends upon the proper construction of St. 1922, c. 501, as amended, in the light of general statutory provisions. The answer requires consideration of the legislative intention with respect to the burden of maintenance and liability for injuries due to defects — whether it was intended that those obligations should be borne by the Commonwealth or by the local communities. If the former, then clearly the way is to be laid out as a State highway; otherwise not.

The direction to the division is "to lay out and construct

a highway, etc.” The highway is not designated as a State highway, and the statute contains no direction to the division requiring it to take charge of the highway. In those respects the statute differs from other statutes providing for the construction of other particular highways. See, for example, St. 1907, c. 574, providing that “the Massachusetts highway commission shall lay out, take charge of and construct as a state highway” a part of Washington Street in the West Roxbury district of Boston. The words “lay out,” when used in statutes with reference to highways, mean locating and establishing a new highway. The imposition upon certain public authorities of the duty of laying out a highway does not necessarily carry with it the right of control by them and the further duty of maintaining that way when laid out and constructed. *Foster v. Park Commissioners*, 133 Mass. 321, 329, 333; *Leahy v. Street Commissioners*, 209 Mass. 316, 317. For that reason the words “take charge of” are used in G. L., c. 61, in conjunction with “lay out,” and a way does not become a State highway under that chapter until it has been “laid out and taken charge of” by the division in behalf of the Commonwealth. I Op. Atty. Gen. 284.

It is my opinion that the Legislature, in providing that the division shall lay out and construct the proposed highway, did not intend to require the division also to take charge of and maintain the highways or to impose on the Commonwealth liability for injuries from defects therein, and that therefore it did not intend to provide that the highway so laid out and constructed should be a State highway. I therefore answer your first question in the negative.

CONSTITUTIONAL LAW — POLICE POWER — RESTRICTION OF IMPORTATION OF CATTLE.

State laws requiring inspection of property intended for domestic use, passed for the protection of the public health, morals or safety, or to guard the public from fraud, are not open to attack as in contravention of the commerce clause of the Constitution of the United States unless they directly discriminate against interstate commerce or are inconsistent with Federal legislation under the commerce clause.

A statute providing that no cattle which react to the tuberculin test shall be shipped into the Commonwealth would be in direct conflict with national legislation contained in the Act of February 2, 1903, c. 349, § 1 (32 Stat. 791), and would therefore be invalid.

You have asked my opinion as to the constitutionality of House Bill No. 382, entitled "An Act to prevent the shipment into the Commonwealth of diseased cattle." The bill provides for the amendment of G. L., c. 129, § 27, by adding at the end thereof the following: —

No cattle to be used for dairy purposes shall be shipped into the commonwealth unless such cattle have been given a tuberculin test, and declared to be free from dangerous diseases, by a competent veterinary surgeon, approved by the director. No cattle which react to the tuberculin test shall be shipped into the commonwealth.

The proposed law, if valid, evidently must be supported as a proper exercise of the State police power. If it is invalid, the objection to it must be that it is an unlawful interference with interstate commerce. State laws requiring inspection of property intended for domestic use, passed for the protection of the public health, morals or safety, or to guard the public from fraud, are not open to attack as in contravention of the commerce clause of the Constitution of the United States unless they directly discriminate against interstate commerce or are inconsistent with Federal legislation under the commerce clause. *Plumley v. Massachusetts*, 155 U.S. 461; *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345; *Savage v. Jones*, 225 U.S. 501.

The United States Supreme Court has held unconstitutional a statute restraining the importation of cattle into a State in such a way as to prevent the bringing in

To the House
Committee on
Bills in the
Third Reading.
1924
April 16.

of cattle which are healthy as well as those that are diseased, on the ground that such legislation was in conflict with the commerce clause. *Railroad Co. v. Husen*, 95 U. S. 465. So, also, statutes in the guise of inspection laws employed to exclude the products and merchandise of other States have been held unconstitutional because they discriminated against interstate commerce. *Minnesota v. Barber*, 136 U. S. 313; *Voight v. Wright*, 141 U. S. 62. On the other hand, it has held that a statute prohibiting transportation of cattle into a State without inspection by State or national officials was constitutional, such legislation not being in conflict with any act of Congress. *Reid v. Colorado*, 187 U. S. 137; *Asbell v. Kansas*, 209 U. S. 251.

I am of the opinion that the proposed law is in conflict with national legislation, to which it must yield. In the Act of February 2, 1903, c. 349, § 1 (32 Stat. 791), it is enacted that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected cattle or other livestock and found them free from infectious, contagious or communicable disease, "such animals, so inspected and certified, may be shipped, driven, or transported . . . into . . . any state or Territory . . . without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture." Concerning this very statute the court said, in *Asbell v. Kansas*, *supra*, 258:—

There can be no doubt that this is the supreme law, and if the state law conflicts with it the state law must yield.

The provision in the proposed law that "no cattle which react to the tuberculin test shall be shipped into the commonwealth" appears to be in direct conflict with this provision.

In my opinion, therefore, the bill would not be valid if enacted, because of the superior authority of the Federal statute.

HUNTING AND FISHING — CERTIFICATE OF REGISTRATION — VIOLATION OF FISH AND GAME LAWS.

Every certificate to hunt, trap and fish issued under G. L., c. 131, §§ 3-14, as amended, becomes void upon the conviction of the holder thereof of any violation of the fish and game laws, and no such certificate may be given to any person so convicted during the period of one year from the date of his conviction.

You request my opinion on the following questions relative to the granting and revocation of fishing and hunting certificates:—

To the Com-
missioner of
Conservation.
1924
April 17.

1. Under G. L., c. 131, § 14, would a person convicted of any violation of any section or any provision of a section of G. L., cc. 130 and 131, forfeit any fishing or hunting certificate he may possess?

2. Would a conviction of a violation of a fish law or of a game law prevent a person from securing both a hunting and a fishing certificate during the period of one year following the conviction?

3. Would a person who did not hold either a hunting or a fishing certificate and who was convicted of a violation of any provision of chapters 130 and 131 forfeit his right to secure a certificate for a period of one year from the date of his conviction?

G. L., c. 131, §§ 3-14, as amended by St. 1921, c. 467, provide for three classes of certificates of registration, namely, a combination certificate to hunt, trap and fish, a certificate to hunt and trap, and a certificate to fish. Section 14, as amended by St. 1921, c. 467, § 8, provides, in part:—

. . . Every certificate issued under sections three to fourteen, inclusive, held by any person convicted of a violation of the fish and game laws or of any provision of said sections, shall be void, and shall immediately be surrendered to the officer securing such conviction. The officer shall forthwith forward the certificates to the director, who shall cancel the same, and notify the clerk issuing them of the cancellation thereof. No person shall be given a certificate under authority of said sections during the period of one year from the date of his conviction as aforesaid. Any such certificate issued to a person within one year of his conviction as aforesaid shall be void, and shall be surrendered on demand of any officer authorized to enforce the fish and game laws. . . .

It is plain that under the statute *every* certificate issued under G. L., c. 131, §§ 3-14, as amended, becomes void upon the conviction of the holder thereof of *any* violation of the fish and game laws, and that no certificate of any class may under these sections be given to any person so convicted during the period of one year from the date of his conviction.

I am accordingly of the opinion that all of your questions should be answered in the affirmative.

TUBERCULOSIS HOSPITALS — APPORTIONMENT OF COST.

In providing for an apportionment of the cost of a public undertaking among cities and towns or other political subdivisions of the Commonwealth benefited thereby, and also in shifting the burden thereof, the Legislature has a large measure of discretion, the exercise of which is not subject to judicial control, on constitutional grounds, unless it is purely arbitrary.

A statute changing the previous law by including in the district served by the Essex County Tuberculosis Hospital cities previously exempted, and requiring them to bear a part of the burden of the cost of its construction and maintenance, apportioned in a way which, under all the circumstances, would be fair and reasonable, would be constitutional.

You have submitted to me Senate Bill No. 468, entitled "An Act to enlarge the present tuberculosis hospital district within the county of Essex and to apportion certain costs incident thereto." and have requested my opinion on the following questions relative to said bill: —

(1) Inasmuch as the cities in Essex county now exempt from the provisions of section seventy-eight to ninety of chapter one hundred and eleven of the General Laws have a majority of the registered voters who elect the trustees of the tuberculosis hospital for said county, does not such control constitute said cities actual parties in interest with respect to the financial cost and administration of said hospital?

(2) Has the General Court the constitutional right to add to the Essex county tuberculosis hospital district, established under said sections seventy-eight to ninety, said cities now exempt, in the manner provided in the bill printed as Senate document number four hundred and sixty-eight?

Sections 78 to 90, inclusive, of G. L., c. 111, as amended by St. 1922, c. 393, contain provisions requiring the county commissioners of certain counties, including Essex, to provide tuberculosis hospitals for cities and towns having a population of less than fifty thousand which do not already have adequate hospital provision. It is provided that the county commissioners, subject to the approval of the Department of Public Health, shall erect one or more hospitals, with an exception in the case of counties having a total population of less than fifty thousand; that they shall apportion the cost to the several towns liable, in accordance with their valuation used in assessing county taxes; that they shall also apportion the cost of maintenance of such hospitals in the same manner; that all sums collected shall be paid into the county treasury; and that the county commissioners shall be trustees of the hospitals so erected. Section 91 provides:—

Cities having more than fifty thousand inhabitants, and also cities and towns having less than fifty thousand inhabitants and already possessing and continuing to furnish adequate tuberculosis hospital provision, shall be exempt from the provisions of sections seventy-eight to ninety, inclusive.

St. 1923, c. 429, entitled "An Act authorizing the apportionment of the expense incurred by the county of Essex for a tuberculosis hospital within said county," contains provisions relative to the apportionment of expenses already incurred and the total cost of the tuberculosis hospital constructed in the county of Essex under the provisions of G. L., c. 111, §§ 78–91, to the cities and towns in said county, except the cities of Haverhill, Lawrence, Lynn, Newburyport and Salem, and the collection of sums so apportioned in conformity with the corresponding provisions in said chapter.

By your first question I understand you intend to ask whether, under existing law, the cities in Essex County now exempt are under any liability for the cost of con-

struction and maintenance of the tuberculosis hospital for Essex County. Since the statutes referred to impose the whole burden of construction and maintenance on the remaining cities and towns, for the benefit of whose inhabitants the hospital was erected, and expressly exempt the five cities enumerated, I see no ground upon which it can be said that the exempted cities are under any obligation whatever in the matter. I therefore answer your first question in the negative.

The fundamental inquiry presented by your second question is whether a part of the cost of construction and maintenance of the tuberculosis hospital for Essex County may be assessed upon the five cities in said county exempted by the provisions of previous enactments.

In providing for an apportionment of the cost of a public undertaking among cities and towns or other political subdivisions of the Commonwealth benefited thereby, and also in shifting the burden thereof, the Legislature has a large measure of discretion, the exercise of which is not subject to judicial control, on constitutional grounds, unless it is purely arbitrary. It is not essential that the burden should be imposed in proportion to the benefits received. The expense may properly be assessed with regard to other considerations as well, such as population, extent of territory and ability to bear the burden. The subject was carefully reviewed in *Opinion of the Justices*, 234 Mass. 612, in which the justices advised the Senate that in their opinion a statute changing a previous apportionment of the cost of the bridge across the Connecticut River between Springfield and West Springfield, confirmed by final decree of court, and providing for a new apportionment among the county and certain towns therein by fixed percentages, would be constitutional. See also *Norwich v. County Commissioners*, 13 Pick. 60; *Scituate v. Weymouth*, 108 Mass. 128; *Agawam v. Hampden*, 130 Mass. 528; *Kingman, petitioner*, 153 Mass. 566; *Kingman, petitioner*, 170 Mass. 111; *Boston, petitioner*, 221 Mass. 468.

It is my opinion that a statute changing the previous law by including in the district served by the Essex County tuberculosis hospital the five cities previously exempted, and requiring them to bear a part of the burden of the cost of its construction and maintenance, apportioned in a way which, under all the circumstances, would be fair and reasonable, would be constitutional. Without information as to the basis of the assessments on the five cities provided by the bill, the amounts already assessed to and collected from the remaining cities and towns, the comparative valuations of all cities and towns in the county, the extent and condition of hospital facilities now provided by the five cities, and other pertinent facts, I cannot answer more definitely your question whether the bill as drawn would be constitutional.

INSURANCE — ACCIDENT INSURANCE — GROUP POLICIES.

Group or blanket policies against loss resulting from accidental injuries are not authorized under the provisions of the statutes, except such as are within the provisions of G. L., c. 175, §§ 110 and 133, as amended.

You have asked my opinion upon three questions relative to accident insurance, two of them concerning forms of policies which you have attached to your letter.

To the Commissioner of
Insurance.
1924
May 5.

Your questions are as follows: —

1. May the commissioner lawfully approve either or both of these forms as complying with G. L., c. 175, §§ 108 and 109?
2. May a company lawfully issue these forms of policies, assuming that they each contain the provisions required by said section 108?
3. Do the provisions of said section 108 require or contemplate the issuance of individual policies to individual insureds?

The forms of policies which you have transmitted plainly come within the type of policy known as the "group" policy, which in certain of its forms is sometimes referred to as a "general" or "blanket" policy, as in G. L., c. 175, § 110. The apparent purpose of each of these forms of

policies transmitted is to insure a group of persons, as and while they are members of a designated club or association, against loss resulting from accidental injuries. In each form it is recited that the required premium is paid by the club or association, and that the members of the club or association at any given time, whose names appear in a schedule of members attached to the policy, are the insureds. Persons ceasing to be members cease to be insured, and new members may be added to the schedule. From the nature of the insurance itself it is manifest that the club or association is not a beneficiary and secures for itself no protection under the policy. It is plain that the relation of employer and employees does not exist between the club, in the one instance, and the association, in the other, and their respective members.

G. L., c. 175, § 3, provides that —

No company shall make a contract of insurance upon or relative to any property or interests or lives in the commonwealth, . . . except as authorized by this chapter or chapters one hundred and seventy-six and one hundred and seventy-seven.

There is no specific authority given by chapter 175 to issue any general, blanket or group policy other than group life insurance policies, defined by G. L., c. 175, § 133, as amended by St. 1921, c. 141, and those mentioned in G. L., c. 175, § 110, as amended by St. 1921, c. 136. The forms of policies under consideration do not come within the terms of either of these last mentioned enactments, whose provisions relate to groups in which the relation of employer and employees exists as between the one paying the premium and the insureds.

In my opinion, general, blanket or group accident insurance policies of the character of those transmitted with your letter may not be lawfully written, in view of the wording of G. L., c. 175, § 3, and of the fact that there is no specific statutory authorization for such forms of policies.

I therefore answer your first two questions in the negative.

I answer your third question to the effect that G. L., c. 175, § 108, construed in connection with the said chapter as a whole, requires and contemplates the issuance of individual policies to individual insureds as opposed to general, blanket or group policies.

INSPECTOR OF ANIMALS — NOMINATION — APPROVAL BY
DIRECTOR OF ANIMAL INDUSTRY — BOARD OF SELECT-
MEN — TERM OF OFFICE.

No nominee for the position of inspector of animals can be appointed until approved by the Director of Animal Industry.

A nomination made by a board of selectmen may be withdrawn by a new board of selectmen and another nominee named if no action has in the meantime been taken by the Director of Animal Industry with respect to the first nomination.

A former appointee holds over and can legally perform the duties of inspector of animals until the approval by the Director of Animal Industry of one nominated as his successor.

You request my opinion as follows: —

In the town of Bedford the regular annual election of a member of the board of selectmen took place during the first week in March. A man by the name of Kelley was said to have been elected by two votes. A recount was asked for and the election for selectman was declared a tie.

On March 22 the board of selectmen, under G. L., c. 129, § 15, sent in the nomination of Dr. Chester L. Blakely as inspector of animals for the year ending March 31, 1925. This nomination, however, did not bear the signature of the newly elected (?) Kelley, but did bear the name of Duane F. Carpenter, whom Kelley (if elected) was to succeed.

The Director of Animal Industry was interviewed by a representative of the losing side at the regular town election, whose candidate was Claude A. Palmer, and was asked to hold up the matter of approval of the nomination of Dr. Blakely.

The Director of Animal Industry desires an opinion by the Attorney General as to whether this nomination of Dr. Blakely is properly before him for action.

A special town election was held March 31, 1924, and Kelley was defeated by Claude A. Palmer by six votes. Directly thereafter, on March 31, a meeting of the new board of selectmen was held, and a majority of the board, Palmer and another, drafted a letter to the director nominating as inspector of animals Dr. Immanuel Pfeiffer.

To the Com-
missioner of
Conservation.
1924
May 9.

The Director of Animal Industry desires the opinion of the Attorney-General as to whether this nomination of Dr. Immanuel Pfeiffer to the position of inspector of animals is properly before him for action.

If in the opinion of the Attorney-General both nominations are properly before the director for action, does the decision rest with him as to which nomination shall be approved, assuming that, in his opinion, both nominees possess the proper qualifications for the position?

The opinion of the Attorney-General is requested as to whether, in case no action is taken by the director, the appointee of last year (1923) holds over, and can he legally perform the duties of the position?

G. L., c. 129, § 15, provides as follows:—

The mayor in cities, except Boston, and the selectmen in towns shall annually, in March, nominate one or more inspectors of animals, and before April first shall send to the director the name, address and occupation of each nominee. Such nominee shall not be appointed until approved by the director. In cities at least one such inspector shall be a registered veterinary surgeon.

Under this section no nominee can be appointed until approved by the Director of Animal Industry. Under the facts submitted by you it does not appear that the director approved or took any action respecting the nomination of Dr. Chester L. Blakely as inspector of animals, which nomination was forwarded to the director on March 22, 1924. Subsequently, on March 31, 1924, a meeting of the new board of selectmen was held and a majority of said board drafted and forwarded to the Director of Animal Industry a communication wherein it is stated that the director is "respectfully requested to disregard the nomination of Dr. Chester L. Blakely of Lexington, as made on or about March 22, 1924, and to consider instead the appointment of Dr. Immanuel Pfeiffer."

Where an authority is conferred on a board in relation to public business it may be exercised by a majority and all need not join. *Codman v. Crocker*, 203 Mass. 146, *Cooley v. O'Connor*, 12 Wall. 391.

The board of selectmen is a continuing body, and, as such, acted within its rights when it withdrew a nomination

which had not been acted upon and substituted therefor a new nomination. It accordingly follows that the nomination of March 31st is the nomination now before the Director of Animal Industry for his approval or disapproval, and I so answer your first, second and third questions.

The general rule is that, unless otherwise provided, an officer continues to hold office until the appointment or election and qualification of his successor. See. G. L., c. 41, § 2. *Boston v. Sears*, 22 Pick. 122, 130. In accordance with this rule I am of the opinion that the appointee of last year (1923) holds over and can legally perform the duties of the position of inspector of animals until the approval of a nominee by the Director of Animal Industry, and I so answer your fourth and last question.

HAWKERS AND PEDLERS — LICENSE — ALIEN.

A local ordinance or regulation providing for the licensing of hawkers and pedlers of fish, fruit and vegetables, passed under authority of G. L., c. 101, § 17, is void if it purported to authorize the granting of a license to an alien who has not declared his intention of becoming a citizen of the United States.

You have requested my opinion as to whether or not a licensing board or other officer of any city where there is an ordinance or regulation providing for the licensing of hawkers and pedlers of fish, fruits and vegetables, may grant such a license to an alien who has not declared his intention of becoming a citizen of the United States.

First, I think I ought to point out that the Attorney-General does not give authoritative opinions to municipal officers, it having been held many times that they are not entitled to such an opinion, and therefore are not bound by it. There was some intimation that this opinion concerned a local situation in New Bedford; but I am proceeding upon the ground that the question is asked because the information is necessary in the discharge of the duties of the Division of Standards under G. L., c. 101, and particularly section 32.

To the Commissioner of
Labor and
Industries.
1924
May 13.

Coming now to your specific question. G. L., c. 101, § 17, is based upon R. L., c. 65, § 15. This section of the Revised Laws was the subject of numerous amendments. In 1916, as a result of Gen. St. 1916, c. 242, § 3, the pertinent provisions read as follows: —

Cities and towns may by ordinance or by by-law, not inconsistent with the provisions of this chapter, regulate the sale and exposing for sale by hawkers and pedlers of said articles without the payment of any fee, and may affix penalties for the violation of such regulations. Cities and towns may require hawkers and pedlers of fish, fruit and vegetables to be licensed, provided that the license fee does not exceed that prescribed by section nineteen of this chapter, as amended, for a license embracing the same territorial limits.

The next amendment, Gen. St. 1918, c. 257, § 261, changed the form of this part of section 15 so as to read as follows: —

Cities and towns may by ordinance or by-law, not inconsistent with the provisions of this chapter, regulate the sale or barter, and the carrying for sale or barter or exposing therefor, by hawkers and pedlers, of said articles without the payment of any fee; may *in like manner* require hawkers and pedlers of fish, fruit and vegetables to be licensed, provided, that the license fee does not exceed that prescribed by section nineteen of this chapter, and acts in amendment thereof and in addition thereto, for a license embracing the same territorial limits; and also may *in like manner* affix penalties for the violation of such regulations, ordinances and by-laws.

The final change to date was by St. 1923, c. 285. The pertinent provision of the statute with which we are now concerned reads as follows: —

The aldermen or selectmen may by regulations, not inconsistent with this chapter, regulate the sale or barter, and the carrying for sale or barter or exposing therefor, by hawkers and pedlers, of said articles without the payment of any fee; may in like manner require hawkers and pedlers of fish, fruit and vegetables to be licensed except as otherwise provided, and may make regulations governing the same, provided that the license fee does not exceed that prescribed by section twenty-two for a license embracing the same territorial limits; and may in like manner

affix penalties for violations of such regulations not to exceed the sum of twenty dollars for each such violation. A hawker and pedler of fish, fruit and vegetables licensed under this section need not be licensed under section twenty-two.

The insertion by this amendment of the phrase "in like manner" discloses, in my opinion, a legislative intent that the aldermen or selectmen may require hawkers and pedlers of fish, fruit and vegetables to be licensed, etc., only by regulations not inconsistent with the other provisions of G. L., c. 101. G. L., c. 101, § 22, clearly indicates an intention that hawkers and pedlers shall be licensed to sell fish, fruit and vegetables only if they are citizens of the United States or have declared an intention to become citizens of the United States. I am therefore of the opinion that a city ordinance which purported to authorize the granting of a hawker's and pedler's license for the sale of fish, fruit and vegetables to an alien who had not declared his intention of becoming a citizen of the United States would exceed the authority granted by G. L., c. 101, § 17, and would be void.

A further practical argument in favor of this view is found in the last sentence of G. L., c. 101, § 17, which provides that "a hawker and pedler of fish, fruit and vegetables licensed under this section need not be licensed under section twenty-two." This provision was added by an amendment subsequent to Gen. St. 1918, c. 257, § 261, quoted above, and I do not, therefore, rest my opinion upon it. It would, however, seem a further indication of a legislative intent that only those hawkers and pedlers who could be licensed under section 22 should be eligible for a license under section 17.

EMINENT DOMAIN — EXTENT OF TAKING — FIXTURES.

Floats used by a yacht club, and not attached to the land otherwise than by moorings, are personal property, and are not included in a taking of realty.

To the Metro-
politan District
Commission.
1924
May 19.

You have asked my opinion as to whether certain floats, formerly the property of the Savin Hill Yacht Club, were at the time of the taking of land of the Savin Hill Yacht Club by the Board of Metropolitan Park Commissioners, on or about December 23, 1914, real or personal property.

A taking was made by the board, recorded in Suffolk Deeds, book 3856, page 241, of "all lands and rights in land, all easements, privileges and appurtenances of every name and nature thereto belonging," among other parcels, of "land and lands of the Savin Hill Yacht Club" (bounded and described) "and flats above or under water in Dorchester Bay and Savin Hill Cove and creeks and streams flowing into said cove."

I am informed that at the time of the taking there was a building on the land, firmly affixed to the soil, with an elevated platform leading from the building, which was used as a yacht club, to a runway, which in turn led to the floats in question. The upper end of the runway was affixed to the platform and its lower end rested upon the float nearest shore, but was not affixed thereto otherwise than by its weight. The floats in question, of which there were several, during the season when sailing for pleasure was practicable, floated on the surface of the water and were kept from drifting away or out of alignment by chains, which were run through rings or holes made for the purpose in the floats and were then fastened to piles driven into the mud in a line extending out from the shore. The floats were not attached to these piles by any rigid connections. They rose and fell with the tide. They were the ordinary type of float used for landings for small boats, and were capable of being towed from place to place, and might be used in connection with other landing places. They were easily unloosed from their moorings to the piles. During

the seasons when sailing near the club was not practicable they were often unmoored from the pilings and dragged upon the beach, where they were left without any permanent fixation to the land until again required for use, when they were once more placed in the water and moored to the piles. I am also informed that these floats, when detached from their moorings, can be sold and used by purchasers in other places of a similar character to which they can be towed.

If these floats had been so attached to the land by the previous owners of the soil as to become fixtures, they would have become real property as between the Commonwealth and the Yacht Club, and title to them would be vested in the Commonwealth under the terms of the taking.

In determining whether articles which in their original condition were personal property, as were these floats, have become fixtures, a variety of tests have to be taken into consideration. These tests, as between vendor and vendee of the land upon which the property is situated, and for the purpose of determining the question here involved, wherein the Commonwealth and the Yacht Club are to be treated substantially as vendor and vendee, have been laid down by our courts as follows: The nature of the article, the object, the effect and the mode of its annexation. *Smith v. Bay State Savings Bank*, 202 Mass. 482; *Houle v. Abramson*, 210 Mass. 83. Neither of these tests is of itself sufficient.

The floats in question are, in their general nature, personality. They are capable of being moved from place to place and of being used effectively in other locations than this particular estate. Their bulk is not an insuperable obstacle to their transportation by land, and they can easily be moved by water. There is nothing about their general form or design which tends to show any particular object or motive in the minds of the owners relative to a particular or unusual relation between them and the realty with which they were connected, nor were they of such a character

or construction as to have in themselves any peculiar relation to the surrounding land which might enhance its value or usefulness more than any other articles of a similar type. They were not annexed to the piles or to the land in any manner or by any means which prevented them from being easily separated therefrom.

Taking all these facts into consideration, I am of the opinion that the floats at the time of the taking were not fixtures in such a sense that they had become part of the realty, and that they were personal property, title to which remained in the owner notwithstanding the taking.

LABOR — CHILDREN — REGULATION OF EMPLOYMENT.

The provisions of G. L., c. 149, §§ 61, 62 and 65, regulating the employment of minors, are applicable to minors when employed in co-operating factories, manufacturing, mechanical or mercantile establishments or workshops, unless such employment is in the course of receiving manual training or industrial education in an approved school, under G. L., c. 149, § 85.

A child between the ages of fourteen and sixteen employed in any such establishment is required by G. L., c. 149, § 86, to secure a special certificate.

You request my opinion on the following questions: —

1. Do the regulations relating to hours of employment and night work for minors under sixteen apply to such minors when employed in a co-operating factory, manufacturing, mechanical or mercantile establishment or workshop; or may such minors be employed in such establishments for more than eight hours in any one day or for more than forty-eight hours in any one week?

2. May such minors be employed in co-operating establishments at the occupations and processes listed in G. L., c. 149, §§ 61 and 62, as prohibited employments for minors under sixteen years of age and minors under eighteen years of age?

Provisions regulating the employment of children of various ages are contained in G. L., c. 149, §§ 60 to 83, inclusive, some of which were amended by St. 1921, cc. 351 and 410. Special reference should be made to the following sections:

Section 60, as amended by St. 1921, c. 410, § 2, prohibits the employment of minors under fourteen in any factory, workshop, manufacturing, mechanical or mercantile establishment or in certain specified occupations, and regulates their hours of labor.

Sections 61 and 62 prohibit the employment of minors under sixteen and eighteen, respectively, in certain specified hazardous occupations.

Section 65, as amended by St. 1921, c. 351, § 1, and c. 410, § 3, regulates the hours of labor of children under sixteen. It is as follows:—

No person shall employ a minor under sixteen or permit him to work in, about or in connection with any establishment or occupation named in section sixty, or for which an employment certificate is required, for more than six days in any one week, or more than forty-eight hours in any one week, or more than eight hours in any one day, or, except as provided in section sixty-nine, before half past six o'clock in the morning, or after six o'clock in the evening. The time spent by such a minor in a continuation school or course of instruction as required by section twenty-two of chapter seventy-one shall be reckoned as a part of the time he is permitted to work.

Section 69, as amended by St. 1921, c. 410, § 1, regulates the employment of children in so-called street trades.

Section 85 contains certain limitations upon the application of sections 60 to 83, inclusive. It is as follows:—

Sections sixty to eighty-three, inclusive, shall not apply to the juvenile reformatories, other than the Massachusetts reformatory, or prevent minors of any age from receiving manual training or industrial education in or in connection with any school which has duly been approved by the school committee or by the department of education.

Section 86, as amended by St. 1921, c. 351, § 2, requires employees of children between fourteen and sixteen in any factory, workshop, manufacturing, mechanical or mercantile establishment, or in any industrial employment, to procure and keep employment certificates, with the following proviso:—

. . . provided, that pupils in co-operative courses in public schools may be employed by any co-operating factory, manufacturing, mechanical or mercantile establishment or workshop, or any employment as defined in section one, upon securing from the superintendent of schools a special certificate covering this type of employment. . . .

It requires also special certificates covering the employment of children between fourteen and sixteen in private domestic service or service on farms.

The inquiry made by your questions is: How far do section 85 and the proviso in section 86 limit the application of the preceding sections?

The proviso in section 86, in my opinion, is merely an exception to the preceding provision in that section. It relates to the employment of pupils in co-operative courses in public schools. The term "co-operative courses" is defined in G. L., c. 149, § 1, as meaning "courses approved as such by the department of education and conducted in public schools where technical or related instruction is given in conjunction with practical experience by employment in co-operating factories, manufacturing, mechanical or mercantile establishments or workshops." Such pupils may be so employed upon securing a special certificate instead of the employment certificate otherwise required.

Section 85 contains two different provisions with respect to sections 60 to 83, inclusive: first, that they shall not apply to juvenile reformatories other than the Massachusetts Reformatory; and secondly, that they shall not "prevent minors of any age from receiving manual training or industrial education in or in connection with any school which has duly been approved by the school committee or by the department of education." I interpret this to mean that courses of instruction in manual training or industrial education may be given in approved schools although they involve employments and hours of labor which are contrary to the provisions of sections 60, 61, 62 or 65, and that schools giving courses of instruction inconsistent with the terms of those sections may be approved by the

school committee or by the Department of Education. Of course, the statutory regulations are not to be lightly disregarded; they should be followed as far as possible consistently with the educational object sought to be achieved.

It may be suggested that so far as concerns sections 60 and 65, section 85 is impliedly repealed by St. 1921, c. 410. That act amended G. L., c. 149, § 69, by adding a provision permitting boys over twelve to engage in certain street trades under certain circumstances. It also amended G. L., c. 149, §§ 60, 65, in substance, by inserting the words "except as provided in section sixty-nine" before certain substantive provisions of those sections. In my opinion, the Legislature did not mean, by expressing this exception, to exclude the exception expressed in section 85. They observed a possible inconsistency between section 69, with which they were principally dealing, and some portions of sections 60 and 65; and so they provided that in case of conflict section 69 should prevail.

My answer to your questions, specifically, is that the regulations of sections 61, 62 and 65 are applicable to minors when employed in co-operating factories, manufacturing, mechanical or mercantile establishments or workshops, unless such employment is in the course of receiving manual training or industrial education in connection with an approved school, under G. L., c. 149, § 85. In that case those regulations will not prevent the giving of such instruction to minors of any age. A child between fourteen and sixteen employed in any such establishment is required by section 86 to secure a special certificate covering that type of employment.

INSURANCE — LAUNDRY INSURANCE — BOND — REBATE.

- A foreign insurance company not authorized to transact the kinds of business specified in the first, second or eighth clauses of G. L., c. 175, § 47, cannot insure a laundry company against hazards necessarily incidental to such kinds of business, but may, under section 105, execute, as surety, a bond to protect the customers against the default of the laundry company to pay losses from such hazards.
- A retention of a portion of the service charge made by the laundry company for the payment of premiums does not, under certain circumstances, constitute an unlawful rebate.

To the Com-
missioner of
Insurance.
1924
May 27.

You have requested my opinion upon certain questions relative to a transaction between an insurance company and a laundry company.

The facts connected with this transaction, as set forth in your letter, differ materially from those which existed in two cases concerning transactions between insurance companies and laundry companies upon which I rendered opinions to your department on June 29, 1923. (Not published.) You state in your letter:—

Some further question is now raised as to the legality of the proposition presently employed by this company. This company is a foreign insurance company licensed to transact in this Commonwealth the classes of business specified in the fourth, fifth, sixth, seventh and twelfth clauses of section 47 of said chapter 175. It cannot, under sections 51 and 152 of said chapter, lawfully transact the kinds of business specified in the first, second or eighth clauses of said section 47.

The laundry company enters into an agreement with the insurance company. The laundry company executes as principal what purports to be a bond, which is also executed by the insurance company as surety, guaranteeing the performance of said agreement.

It appears from a letter written on behalf of the insurance company that the agreement is apparently intended to cover loss or damage caused by fire, stealing, burglary or, in fact, any hazard.

The particular laundry company referred to in the documents attached to my letter, I am informed, retains fifty per cent of the premiums which it collects, remitting the balance to the insurance company. Twenty per cent of the premiums retained by this laundry company is for a reserve fund out of which it may pay claims of its customers, not exceeding \$100. The remainder it retains ostensibly for other costs. It apparently makes

no express written contract with its clients, but collects from them one cent for each bundle of laundry and specifically charges said sum to the client upon its bill.

I respectfully request your opinion on the following questions:

(1) Is the said agreement one which the insurance company may lawfully make under said chapter 175?

(2) Is the said agreement or bond in effect a contract of insurance made by this insurance company against loss or damage by fire or any of the other hazards specified in the first, second or eighth clause of said section 47?

(3) Does said agreement or bond constitute an insurance contract by this insurance company against the hazards specified in more than one of the clauses of said section 47, and is it, therefore, contrary to section 52 of said chapter 175?

(4) If the preceding question is answered in the affirmative, may the commissioner lawfully approve said agreement or said bond under said section 52?

(5) Is the said bond an obligation upon which the said insurance company may lawfully act as surety under section 105 of said chapter 175?

(6) Does the allowance to a laundryman by the insurance company of a portion of the premiums collected by him constitute a rebate in violation of sections 182 to 184 of said chapter 175, (a) if used in whole or in part by the laundryman to pay claims of his customers; (b) if used in part to pay such claims and in part to defray expenses in connection with the operation of the plan; and (c) if retained entirely by the laundryman for his personal use?

In the case presented by your letter and the documents annexed thereto it appears that a surety bond in which a laundry company is named as principal and certain of its customers severally appear to be obligees, with an insurance company designated as surety, has been executed by the laundry company and the insurance company. In this bond it is recited that the laundry company has voluntarily waived its legal defenses to any claim of its customers for any bundle of laundry delivered to the laundry company and not returned by it in like good order, ordinary laundry wear excepted, and that the laundry company is desirous of giving further assurance to its customers that their claims will be promptly adjusted. The laundry company binds itself, to each of its customers who shall

pay a service charge, that it will pay promptly, as liquidated damages, to any one of them in settlement of any claim made by any of them for any bundle delivered to the laundry company and not returned in like good order, ordinary laundry wear excepted, as that in which it was received, the fair value of the goods; provided that the claim is not in excess of a stated amount and is made within thirty days. And the insurance company obligates itself to pay to any of such customers the amount so due upon any claims against the laundry company, in the event that the laundry company fails to make payment.

I am informed that the laundry company sends to each of its customers a slip, of which the following is a copy:

A NEW SERVICE.

Do you know that a laundry is not legally responsible for the customer's goods unless the laundry is proven negligent? While we try to use all reasonable care, accidents do happen from many causes, causing substantial loss. We prefer to adjust such matters promptly and to avoid the delay, friction and expense of litigation, in order to give our customers the most complete service. We, therefore, voluntarily waive our legal defenses to any claim made for any bundle delivered to us and not returned in like good order, ordinary laundry wear excepted, and we have taken a surety company bond to secure prompt payment to you, as liquidated damages in settlement of any such claim, the fair value of the goods, but not exceeding twenty times the laundry charge.

The charge for this service is one cent per bundle to defray the expense of the service and of the surety company bond. We will arrange for this service with our next delivery.

It is to be noted that in this slip the laundry company states:

We, therefore, voluntarily waive our legal defenses to any claim made for any bundle delivered to us and not returned in like good order . . . and we have taken a surety company bond to secure prompt payment to you, as liquidated damages in settlement of any such claim, the fair value of the goods, but not exceeding twenty times the laundry charge.

Concurrently with the execution of the bond the insurance company and the laundry company execute an "agreement." Clause 8 of this agreement reads as follows: —

The laundry may settle, and charge to the account of the corporation, claims other than those enumerated in paragraph 3 above; provided that settlements so made and charged shall not exceed 10% per 100 bundles, delivered or returned to customers, in any calendar month, except with the consent of the corporation. If and when such settlements for any calendar month exceed 10c per 100 bundles, the corporation will pay the excess.

The laundry shall promptly furnish to the corporation such information as may be required by it in reference to claims paid or filed, and the corporation shall have the option of adjusting the pending claim direct with the customer.

In event claim for any one or more of several bundles, resulting from any one event, be settled for less than the maximum limit per bundle fixed in paragraph 2, the difference may be applied to settlement for the other bundles for which the laundry deems it necessary to pay more than the agreed limit; provided that the maximum liability of the corporation be not thereby increased.

The purport and intent of the agreement are to provide for the payment to the laundry company by the insurance company of the amount of all losses which the former may sustain by reason of damage to the contents of the laundry bundles of its customers while in its possession. The agreement permits the adjustment and payment of claims in the first instance by the laundry company, but reserves to the insurance company the right, at its option, of making any particular adjustment with the customer direct. The agreement is in effect a policy of insurance by the insurance company against loss which the laundry company may sustain by damage from all causes or hazards to the property of its customers, of which it is the bailee. The liability of the insurance company upon this agreement is in addition to its liability as surety upon the bond, and is of a different character. The voluntary waiver by the laundry company of defenses, and acceptance of a certain mode for the purpose of determining liquidated damages, does not affect the nature of its agreement with the insurance company. Upon its bond the insurance company is liable to the laundry company's claimants upon the default of the laundry company in paying their just claim for damages.

Upon the agreement the insurance company is liable to the laundry company for the amount of the latter's losses upon such claims.

You inform me in your letter that this insurance company cannot lawfully transact the kind of business specified in the first, second, or eighth clauses of G. L., c. 175, § 47. The agreement which the insurance company enters into with the laundry company is in effect a contract of insurance against losses to property in the possession of the laundry company from any and all causes or hazards. Many of such causes or hazards, against which the agreement purports to protect the laundry company, are those specifically mentioned in the first, second and eighth clauses of section 47. As business relative to insurance against such causes cannot lawfully be transacted by this insurance company, this agreement, which purports to insure against damage from such causes, among others, is not one which this company may lawfully make. I therefore answer your first question in the negative.

I answer your second question, so far as it relates to the agreement, in the affirmative, but in the negative as it relates to the bond.

I answer your third question, in so far as it relates to the agreement, in the affirmative, and, in so far as it relates to the bond, in the negative.

I answer your fourth question to the effect that the bond is not a contract of insurance and does not require the approval of the Commissioner under the provisions of G. L., c. 175, § 52. So far as your question relates to the agreement, I answer that in its present form, for the reason that it covers losses from causes as to which this insurance company is not authorized to transact business, the Commissioner may not lawfully approve it.

I answer your fifth question in the affirmative.

Construing the terms of the particular agreement now before me, I am of the opinion that the retention of money arising from the service charge mentioned in paragraph 4

of the agreement by the laundry company does not constitute a rebate in violation of G. L., c. 175, §§ 182-184, under any of the conditions mentioned in your question as (a), (b) and (c). A particular arrangement not provided for in the agreement, by which a particular assured was permitted to retain a portion of the premium mentioned in paragraph 7 for any purpose other than the payment of claims upon which the insurance company was to indemnify the laundry company, would be unlawful under the terms of sections 182-184.

INSURANCE — INVESTMENT OF FUNDS OF DOMESTIC LIFE COMPANIES — SECURITIES OF EQUIPMENT TRUSTS.

G. L., c. 175, § 66, does not prohibit a domestic life insurance company from investing one-quarter of its reserve in the notes of an equipment trust not a corporation, the owners of whose stock or evidences of indebtedness may be liable to an assessment except for taxes.

Section 66 does not prohibit a domestic life company from investing three-quarters of its reserve in equipment trust notes which comply with paragraph 6 of section 63, nor does it forbid investment of one-quarter of the reserve in an unincorporated business or its securities, provided that such investment be secured by collateral.

You have asked my opinion regarding various matters connected with the investment of certain funds of domestic life insurance companies under G. L., c. 175, as amended.

To the Com-
missioner of
Insurance.
1924
May 27.

Your first question is: —

Does G. L., c. 175, § 66, as amended, prohibit any domestic life company from investing one-quarter of its reserve in equipment trust notes not complying with the provisions of paragraph 6 of section 63?

St. 1923, c. 297, amends G. L., c. 175, as previously amended by St. 1921, c. 215, by striking out sections 63 and 66 and inserting in place thereof two new sections, numbered 63 and 66, respectively.

Section 63 now provides, in part: —

The capital of any domestic company, other than life, and three fourths of the reserve of any domestic stock or mutual life company, shall be invested only as follows: — . . .

6. In the notes of any equipment trust created in behalf of any railroad coming within the terms of paragraph four or five, provided that the plan of such trust, in case of any railroad coming within the terms of paragraph four, includes an initial cash payment of at least twenty-five per cent, and, in case of any railroad coming within the terms of paragraph five, of at least forty per cent, and that such notes mature not later than fifteen years from the date of issue.

Section 66, as now amended, provides, in part: —

Except as hereinbefore authorized, no domestic life company shall invest any of its funds in any unincorporated business or enterprise or in the stocks or evidence of indebtedness of any corporation the owners or holders of which stock or evidence of indebtedness may in any event be or become liable on account thereof to any assessment except for taxes, nor shall such life company invest any of its funds in its own stock or in the stock of any other company. No such company shall invest in, acquire or hold directly or indirectly more than ten per cent of the capital stock of any corporation, nor shall more than ten per cent of its capital and surplus be invested in the stock of any one corporation. No such company shall subscribe to or participate in any underwriting of the purchase or sale of securities or property, or enter into any transaction for such purchase or sale on account of said company jointly with any other person nor shall any such company enter into any agreement to withhold from sale any of its property, but the disposition of its property shall be at all times within the control of its board of directors.

Nothing in this section or in section sixty-three shall prevent such company from investing or loaning any funds, not required to be invested as provided in section sixty-three, in any manner that the directors may determine; provided, that such funds shall not be invested in the purchase of stock or evidence of indebtedness prohibited by the preceding paragraph, and provided that no loan of such funds shall be made to an individual or firm unless it is secured by collateral security.

The manner in which a domestic life insurance company shall deal with the investment of three-fourths of its reserve is governed by said sections 63 and 66. The manner in which it shall deal with the remaining one-fourth of its reserve is governed by the second paragraph of said section 66. As regards the investment of one-fourth of its reserve, the directors are free to make any reasonable investments, subject only to prohibitions against investment in stocks

or evidence of indebtedness forbidden by the first paragraph of section 66, and unsecured loans to individuals. The second paragraph of section 66 does not contain any prohibition against the purchase of notes of equipment trusts not complying with the provisions of paragraphs 4 or 5 of section 63. The second paragraph of section 66, by reference to the first paragraph, does contain a direct prohibition against the investment of any funds of such a company "in the stocks or evidence of indebtedness of any corporation the owners or holders of which stock or evidence of indebtedness may in any event be or become liable on account thereof to any assessment except for taxes." This prohibition is binding upon the directors of the company as to their investment of the one-fourth part of the reserve under consideration.

I therefore answer your question to the effect that, if an equipment trust is not a corporation, the owners of whose stock or evidences of indebtedness may be liable to an assessment except for taxes, then the provisions of section 66 do not prohibit a domestic life insurance company from investing one-quarter of its reserve in the notes of such an equipment trust.

Your second question is as follows: —

Does said section 66 permit a domestic life company to invest three-quarters of its reserve in equipment trust notes which comply with the provisions of said paragraph 6, (a) if the trustee is not a corporation, and (b) if the trustee is a corporation?

The investment of three-quarters of the reserve of a domestic life insurance company is governed primarily by section 63. Section 66 sets forth certain prohibitions relative to the investment of the funds of domestic life insurance companies, but these prohibitions are effective only if preceding sections of the chapter have not authorized the acts which the terms of section 66 purport to prohibit. Section 66 begins with the words "except as hereinbefore authorized." Section 63 specifically authorizes, in para-

graph 6, the notes of equipment trusts which comply with the provisions therein set forth for investment of three-fourths of the reserve of a domestic life insurance company, and makes no limitation relative to such investment based upon the trustee being a corporation or unincorporated.

The prohibition contained in section 66, concerning investments in unincorporated enterprises, does not apply to investments in the equipment trusts mentioned in section 63, because as to these the investment has, in the language of section 66, "hereinbefore been authorized." Accordingly, I answer your question, both as to subsections (a) and (b), in the affirmative.

Your third question is as follows: —

Does said section 66 prohibit a domestic life company from investing one-quarter of its reserve in any unincorporated business or enterprise or in any securities excepting stocks or evidence of indebtedness of any corporation, the owners or holders of which stock or evidence of indebtedness may in any event be or become liable on account thereof to any assessment except for taxes?

I answer this question in the negative, adding that section 66 forbids the making of a loan to a firm or individual without securing such loan by collateral security.

Your fourth question is as follows: —

Is a domestic life insurance company owning notes or certificates of an equipment trust described in paragraph 6 of said section 63 a creditor of the trust?

The word "certificates" is not used in section 63. In the ordinary acceptance of the word, a "note" is a promise to pay money, which creates as between the maker and the payee the relation of debtor and creditor.

I am informed that these equipment trust notes are commonly called, also, participation certificates, and that in the form in which they are sometimes issued they are in realty certificates of part ownership in physical property,

the title to which is held by the trustee for the benefit of all the owners of such certificates. When so issued they are not in the nature of promises to pay to the holder by the trust, and the relation of creditor and debtor does not exist. Whether or not the holder of one of these notes or certificates issued by an equipment trust in any given instance can be termed a creditor of the trust, depends upon the form and wording of the instrument which is purchased from the trust.

INSURANCE — SINGLE PREMIUM DEFERRED ANNUITY
POLICY — CASH VALUE.

The cash value of "a single premium deferred annuity policy," called a "deferred income bond," to be paid at the death of the insured, is to be computed under the provisions of G. L., c. 175, §§ 132, 142.

You have asked my opinion relative to certain provisions of "a single premium deferred annuity policy." In your letter you state:—

To the Com-
missioner of
Insurance.
1924
May 28.

One of our domestic life companies has submitted to this department for approval a single premium deferred annuity policy which the company has designated "deferred income bond," which contains a provision that: "In case the said bondholder should die before the.....day of.....one thousand nine hundred and, no income payment will be made under this contract, but if the contract is in force at the death of the bondholder, the cash value of this contract at the end of the contract year in which death occurs, less any indebtedness to the company hereunder shall, upon receipt of due proof of such death, be paid to the executors or administrators of the bondholder, unless otherwise provided."

On a policy of this kind with a single premium of \$1,000, the cash value of the policy at the end of thirty years is \$2,680, the addition \$1,680 representing accumulated interest on the original single premium of \$1,000.

In view of the fact that the statute requires annuity policies to contain in substance all of the provisions required of life and endowment policies unless the refund on the death of the annuitant is limited to a "sum not exceeding the premiums paid thereon," I desire your opinion as to whether

or not the statute permits such refund to include any or all of the interest accretions from said premiums.

If the words "any sum not exceeding the premiums paid thereon" are construed as including interest accretions, what is the maximum rate of interest which should be allowed? (See G. L., c. 175, § 9.)

It is apparent from the terms of the policy as set forth in your communication that the payee, at the death of the insured, would receive the cash value of the policy at the end of the year in which the death occurs, and that this cash value would be greater than the amount of the premium paid for the policy. The policy is therefore not one of the annuity or endowment policies which, under the terms of G. L., c. 175, § 132, are excepted from the general requirement that policies shall not be issued unless they contain in substance the provisions of section 132, clauses 8 to 12, so far as applicable to single premium contracts. The words "sum not exceeding the premiums paid thereon," limiting the class of policies which are not required to contain the other provisions of the statute, do not include in their connotation accretions by way of interest to such premiums, but are limited to the amount of the actual premiums paid. What the payee will receive on this policy is stated to be "the cash value of this contract at the end of the contract year." As the policy must contain the other provisions of section 132, the cash value of the policy which is to be paid at the death will be computed as indicated therein and in the general mode of making such computations as set forth in section 142. The reserve of the insurance company may not be unduly entrenched upon for the benefit of policy holders of this particular contract by a mode of computing cash value or reckoning interest, which shall be peculiarly favorable to them, and so work a diminution of the funds to the detriment of other classes of insureds.

In view of the opinion which I have expressed herein, the question contained in the last paragraph of your letter does not require a further answer.

STATE RETIREMENT SYSTEM — SALARY OR WAGES.

Extra compensation for special services out of office hours is not "salary," within the meaning of G. L., c. 30, § 21.

Under G. L., c. 32, § 1, as amended by St. 1922, c. 341, § 1, additional compensation for discontinuous employment out of office hours is not "salary or wages," and should not be considered in computing a pension payable under G. L., c. 32, § 5, par. (2) *C* (b).

You have requested my opinion as to the meaning of the words "salary or wages," defined by G. L., c. 32, § 1, as amended by St. 1922, c. 341, § 1, as applied to the case stated by your letter. You state that a member of the State Retirement Association created by G. L., c. 32, who has been employed continuously since November 28, 1902, in the Department of Conservation, Division of Animal Industry, must now be retired from the service on account of age. You further state that the member, in addition to the regular salary received by him from the Department of Conservation, acted as a member of three separate boards of civil service examiners, as provided by G. L., c. 13, § 6, and received for this additional service, as compensation for marking the examination papers, a sum amounting to \$500 or \$600 per year. Upon the basis of these facts you ask whether such compensation received by the member, in addition to the amount paid him for the work performed in regular office hours as an employee of the Department of Conservation, should be deemed by you "salary or wages" in determining the amount of pension payable under G. L., c. 32, § 5, par. (2) *c* (b). You further ask whether similar compensation received by an employee of one department from a department other than the one in which he is required to give full time should be considered irregular compensation and not subject to annuity deductions.

G. L., c. 32, § 1, as amended by St. 1922, c. 341, § 1, defines the words "salary or wages" as follows: —

"Salary or wages," cash received for regular services together with such allowance for other compensation not paid in cash as may be hereinafter provided.

To the State
Board of
Retirement.
1924
June 2.

Section 4 of G. L., c. 32, provides for the creation of an annuity and pension fund from deposits by members and contributions by the Commonwealth. Section 5 provides for the administration of annuity and pension funds by the payment to members, upon retirement, of annuities from employees' deposits [par. (2) B], and pensions derived from contributions by the Commonwealth [par. (2) C]. These pensions are divided into two classes, — (a) pensions based upon service subsequent to June 1, 1912, and (b) pensions based upon service prior to that date.

G. L., c. 32, § 5, par. (2) C (b), provides, in part, as follows: —

Pensions based upon prior service. Any member of the association who reaches the age of sixty and has been in the continuous service of the commonwealth for fifteen years or more immediately preceding and then or thereafter retires or is retired, and any member who completes thirty-five years of continuous service and then or thereafter retires or is retired, shall receive, in addition to the annuity and pension provided for by paragraphs (2) B and (2) C (a) of this section, an extra pension for life as large as the amount of the annuity and pension to which he might have acquired a claim if the retirement system had been in operation at the time when he entered the service of the commonwealth, and if accordingly he had paid regular contributions from that date to June first, nineteen hundred and twelve, at the same rate as that first adopted by the board, and if such deductions had been accumulated with regular interest.

In order to compute the pension to which a retiring member is entitled, in accordance with the above provision, it is accordingly necessary to estimate the amount of the annuity and pension to which, if the retirement system had been in operation at the time when he entered the service of the Commonwealth, he might have acquired a claim under the provisions of paragraph (2) B and (2) C (a) of section 5.

Paragraph (2) C (a) of section 5 provides that a retiring member shall receive a pension equivalent to the annuity to which he is entitled under paragraph (2) B; and paragraph (2) B provides as follows: —

Annuities from Employees' Deposits. — Any member who reaches the age of sixty and has been in the continuous service of the commonwealth for fifteen years immediately preceding and then or thereafter retires or is retired, . . . shall receive an annuity to which the sum of his deposits under section four (2) A, with such interest as shall have been earned thereon, shall entitle him, . . .

It follows that the amount both of pensions based upon subsequent service and of pensions based upon prior service depends upon the size of the annuity from employees' deposits, to which the retiring member is entitled under section 5, paragraph (2) B; and that the size of this annuity, in turn, depends upon the amount of the deposits which the member was required to make by section 4, paragraph (2) A.

Section 4, paragraph (2) A, reads as follows: —

Deposits by Members. — Each member shall deposit in this fund from his salary or wages, as often as the same are payable, not less than one nor more than five per cent thereof, . . .

The question asked by you resolves itself, therefore, into an inquiry as to the meaning of the phrase "from his salary or wages" in the above provision.

Had G. L., c. 32, contained no definition of the phrase "salary or wages," I am of the opinion that that phrase would not include such additional and irregular compensation for special work, performed out of regular office hours, as that set forth by you in your letter. It has been determined by this department repeatedly that such extra compensation for special services out of office hours is not "salary," within the meaning of G. L., c. 30, § 21, which provides that no person shall at the same time receive more than one salary from the treasury of the Commonwealth. See II Op. Atty. Gen. 21, 309; V Op. Atty. Gen. 697, 699. As stated in the last opinion cited above, the word "salary" is normally limited to "compensation established on an annual or periodical basis and paid usually in instal-

ments, at stated intervals, upon the stipulated per annum compensation."

In any event, the definition of "salary or wages" introduced into the act by the amendment of 1922 would seem conclusive on this point. In my opinion, additional compensation for discontinuous employment out of office hours cannot be considered "cash received for regular services"; and it is, I think, obvious that the last phrase of the definition, "together with such allowance for other compensation not paid in cash as may be hereinafter provided," has no application to the case put by you.

I am accordingly of the opinion that upon the facts stated in your letter additional compensation of the kind in question would not be subject to annuity deductions under G. L., c. 32, § 4, par. (2) A; and should therefore, of course, not be considered in computing a pension payable under section 5, paragraph (2) C (b). I therefore answer your first question in the negative, and your second question also in the negative so far as it is applicable to the case which you have presented.

STATE RETIREMENT ASSOCIATION — MEMBERSHIP — AGE.

The State Board of Retirement would not be justified in retiring a person who purported to join the association after June 1, 1912, at the supposed age of fifty-three years but who, in fact, at that time had passed the age of fifty-five years, such person not being a member of the association, and accordingly not entitled to retirement.

To the State
Board of
Retirement.
1924
June 3.

You have requested my opinion as to whether G. L., c. 32, § 2, par. (1), qualifies St. 1911, c. 532, § 3, par. (2), so that the board would be justified in retiring a person who purported to join the association in 1912 at the supposed age of fifty-three years, but who, in fact, at that time had passed the age of fifty-five years. I assume that the person in question was not in the service of the Commonwealth on or prior to June 1, 1912, which is referred to as the date

on which the State Retirement Association was established.
G. L., c. 32, § 2, par. (1).

G. L., c. 32, § 2 par. (1), reads as follows: —

All persons who are now members of the state retirement association established on June first, nineteen hundred and twelve, shall be members thereof.

St. 1911, c. 532, § 3, par. (2), reads as follows: —

All employees who enter the service of the commonwealth after the date when the retirement system is established, except persons who have already passed the age of fifty-five years, shall upon completing thirty days of service become thereby members of the association. Persons over fifty-five years of age who enter the service of the commonwealth after the establishment of the retirement system shall not be allowed to become members of the association, and no such employee shall remain in the service of the commonwealth after reaching the age of seventy years.

G. L., c. 32, § 2, par. (1), corresponds to and is substituted for St. 1911, c. 532, § 3, par. (1). This latter section reads as follows: —

All employees of the commonwealth, on the date when the retirement system is established, may become members of the association. On the expiration of thirty days from said date every such employee shall be considered to have elected to become, and shall thereby become, a member, unless he shall have within that period, sent notice in writing to the state insurance commissioner that he does not wish to join the association.

The difference in phraseology is due to the fact that in 1911 the association had not come into existence, whereas, at the time when the General Laws were drafted the association was established. There seems to be nothing in G. L., c. 32, § 2, par. (1), which can be construed as indicating an intent to change in any way the qualifications of membership in the association; or to confirm membership in any who may previously have been improperly regarded as members.

I am of the opinion that G. L., c. 32, § 2, par. (1), does not make the person referred to a member of the association and thereby entitled to retirement under G. L., c. 32, § 2, par. (9), as amended.

CONSTITUTIONAL LAW — THEATRES — REGULATION OF RE-SALE OF TICKETS.

Dealers in the resale of tickets to places of amusement may be required to be licensed.

The original price of such tickets may be required to be printed upon the face thereof.

The resale price of such tickets may be restricted to an advance of not over fifty cents above the original price.

To the
Governor.
1924
June 5.

I have the honor to acknowledge the submission to me for examination and report of Senate Bill No. 510, entitled "An Act to regulate the sale and resale of tickets to theatres and other places of public amusement, as a matter affected with a public interest, in order to prevent fraud, extortion and other abuses."

Proposed legislation, having marked fundamental similarities to the provisions embodied in this bill, has been at various times before this office for examination, and it has been the uniform opinion of my predecessors in office that those various items of legislation were unconstitutional. Opinions to this effect are found in III Op. Atty. Gen. 491; IV Op. Atty. Gen. 519; VI Op. Atty. Gen. 445.

It will perhaps not be serviceable, in view of the recent opinion of the justices of the Supreme Judicial Court, to consider in detail whether the present bill can be distinguished as to its constitutionality from those earlier proposed measures.

By Senate order under date of March 28, 1924, in connection with the consideration of House Bill No. 1038, the opinion of the justices of the Supreme Judicial Court was required upon a series of questions bearing upon the validity of regulations of ticket speculation. The opinion of the

justices in response to that order is found in 247 Mass. 583. It answers in the affirmative subdivisions (A), (C), (D), (E) and (F) of question (1), and in the negative subdivision (B), and continues

Although we do not observe any unconstitutional provision in the proposed bill, we respectfully ask to be excused from answering question (2) touching its constitutionality in all its provisions.

A textual comparison of the present bill with House Bill No. 1038, as then submitted to the consideration of the justices, does not disclose the addition of any provisions which affect adversely the constitutionality of the bill. On the contrary, certain features of House Bill No. 1038 have been eliminated; perhaps the most significant elimination, from the point of view of constitutionality, is that which makes the proposed section 185 (A) of chapter 140 of the General Laws, as found in the present bill, deal only with the business of reselling tickets, whereas the corresponding section in House Bill No. 1038 dealt also with any and every resale, however casual.

The proposed section 182 (A), as found in the present bill, seems clearly covered as to its constitutionality by the answer made by the justices to question 1 (A). Sections 185 (A), (B), (C), (E), and some aspects of (F), as found in the present bill, are similarly covered by the answer made by the justices to questions 1 (C) and 1 (D). Any claim that the statute as now drawn gives to the Commissioner of Public Safety powers so broadly expressed as to be conceivably susceptible to abuse through arbitrary action is probably answered by *Douglas v. Noble*, 261 U. S. 165. Section 185 (D) and some aspects of section 185 (F) are similarly covered by the answer of the justices to question 1 (F). Section 185 (G) in the present bill does not seem to establish any unreasonable classifications.

The Court of Appeals of New York, in *People v. Weller*, 237 N. Y. 316, has also held constitutional a statute of that State quite similar to the present bill. The court points

out the fact that theatres and other places of amusement are in numerous aspects the unquestioned subject of police power regulation, that there are certain tendencies to monopoly occurring in the business of reselling tickets, and that the business of speculating in theatre tickets is one "through which the general public is compelled to pay a group of men for services which, at least in part, are not desired by the public." The reasoning of the justices in the opinion rendered to the Senate relies largely upon the ground that "the maintenance of theatres and other places of amusement is for the use of the public and affected with a public interest."

The three main features of the statute are the requirement of printing the price on the tickets, the licensing of dealers in tickets, and the restricting of the profits which such dealers may make upon resales. If the price-fixing aspect should be taken as the central feature of the statute the other provisions would be reasonably calculated to aid in its enforcement, and might be constitutional for that reason, if for no other, if the price-fixing provision is constitutional. Assuming, however, that these three main divisions of the bill are separable, there would still probably be little difficulty in holding constitutional the parts relating to the printing of the price and to licensing, as measures for the prevention of frauds.

The constitutionality of fixing the resale price is intrinsically a much more doubtful question, upon which differences of opinion are not merely likely but inevitable. I feel constrained, in the light of the opinion of the justices referred to above, to say that the proposed bill will, if enacted, be constitutional.

I would respectfully call attention to the form of proposed section 185 (G). As that section now stands, the words "the six preceding sections" would seem to mean the six sections preceding section 182 (A) of chapter 140 of the General Laws; whereas, it is plain that the reference was meant to be to the six sections, 185 (A) to (F), inclusive,

which in the proposed bill immediately precede section 185 (G). There might also be some question as to what terms are modified and governed by the words "religious, educational or charitable," which immediately precede the words "institutions, societies or organizations or civic leagues or organizations not organized for profit, etc." I would suggest that by eliminating the two commas which follow, respectively, the words "religious" and "institutions," and by inserting a comma between the word "organizations" and the words "or civic leagues," the probable intention of this provision would be more clearly expressed.

CONSTITUTIONAL LAW — RATIFICATION OF PROPOSED
AMENDMENT TO THE FEDERAL CONSTITUTION —
SUBMISSION TO THE PEOPLE FOR AN EXPRESSION
OF OPINION.

An act to ascertain the opinion of the people of the Commonwealth as to the desirability of ratifying a proposed amendment to the Constitution of the United States, by submitting the question to the voters at a State election, would be constitutional.

You have submitted to me for examination and report House Bill No. 1828, entitled "An Act to ascertain the opinion of the people of the Commonwealth as to the ratification of the proposed amendment to the Constitution of the United States empowering the Congress to limit, regulate and prohibit the labor of persons under eighteen years of age."

To the
Governor.
1924
June 5.

This proposed act provides, in substance, that for the purpose of ascertaining the opinion of the people of the Commonwealth as to the desirability of ratifying the proposed amendment to the Constitution of the United States, referred to in the title, there shall be placed upon the ballot to be used at the biennial State election in the current year the question: "Is it desirable that the General Court ratify the following proposed amendment to the Constitution

of the United States?" — the terms of the proposed amendment being then set out; that the votes upon said question shall be received and counted; that the Governor shall make known the result; and that a statement of the result shall be submitted to the General Court during the first week of the session in the year 1925.

By St. 1920, c. 560, entitled "An Act to provide for ascertaining the opinion of the people as to proposed amendments to the Federal Constitution," it was provided that "if a proposed amendment to the Federal Constitution is duly submitted to the General Court, as provided in article five of the Constitution of the United States, and is not ratified at the session at which it is submitted," the question whether such ratification is desirable shall be submitted to all the voters of the Commonwealth at a subsequent State election. It may be a matter of some doubt whether or not the proposed amendment to which the pending bill relates has yet been duly submitted to the General Court, within the terms of that statute; but that question is immaterial to the present discussion. The only question is whether the proposed measure in any respect violates any provision of either the State or the Federal Constitution.

The Supreme Court of the United States has held that a requirement in a State constitution that the question of ratification of a proposed amendment to the Constitution of the United States should be referred by a referendum to the electors of the State for ratification was inconsistent with the Constitution of the United States. *Hawke v. Smith*, No. 1, 253 U. S. 221; *Hawke v. Smith*, No. 2, 253 U. S. 231; *Leser v. Garnett*, 258 U. S. 130, 137. But the distinction between the requirement held unconstitutional by the United States Supreme Court and the provision in the proposed act is fundamental. The provision which the Supreme Court declared to be unconstitutional attempted to give the people power to pass finally upon the question of ratification, substituting the electors of the State for the Legislature as the ratifying body. The proposed act, how-

ever, seeks only to obtain the opinion of the electors as a preliminary to subsequent independent action by the Legislature itself. In my opinion, therefore, the proposed act is in no respect in violation of the United States Constitution.

There remains the question whether any provision of the Constitution of Massachusetts is violated by this act. A similar question was considered in an opinion rendered to the committee on bills in the third reading of the House of Representatives, by whom my opinion was requested as to the constitutionality of a bill entitled "An Act to ascertain the will of the people of Massachusetts with reference to the Eighteenth Amendment to the Constitution of the United States and the enforcement thereof." VII Op. Atty. Gen. 109. In that opinion I expressed the view that the proposed act there in question was within the power given to the Legislature by Mass. Const., c. I, § 1, art. IV, "to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions not repugnant or contrary to the constitution, as they shall judge to be for the good and welfare of the Commonwealth"; that the spending of public money for printing the questions referred to in the act and tabulating the returns of votes was an expenditure for a public purpose; and that the proposed bill, if enacted, would not be repugnant or contrary to the Constitution, and would be constitutional. For the same reasons it is my opinion that the bill now before me, if enacted, would not be violative of any provision of the State Constitution.

ELIGIBILITY OF A MEMBER OF THE GENERAL COURT TO
OTHER EMPLOYMENT BY THE COMMONWEALTH —
SALARY.

A member of the General Court is not eligible for other employment by the Commonwealth if his compensation for such other employment is "salary," or if such other employment in any way infringes upon the duties of the member as a legislator.

To the
Secretary.
1924
June 9.

You have asked my opinion as to "whether a member of the General Court is eligible, during the term for which he was elected, for temporary employment on matters relating to primaries and elections in the Department of the Secretary of the Commonwealth."

G. L., c. 30, § 21, provides: —

A person shall not at the same time receive more than one salary from the treasury of the commonwealth.

Since there can be no doubt that the compensation received by a member of the Legislature is "salary," it follows that a member of the Legislature can receive no compensation from your department if such compensation would properly be described as "salary."

Whether a particular compensation is or is not to be termed "salary" is sometimes a troublesome question. I am not sufficiently advised as to the form and nature of the compensation to be paid by your department to express an opinion as to whether it should be termed "salary" or not. The following quotation sets forth the general considerations bearing on the question (V Op. Atty. Gen. 699): —

"Salary" . . . is limited to compensation established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated per annum compensation. It differs from the payment of a wage in that in the usual case wages are established upon the basis of employment for a shorter term, usually by the day or week, or on the so-called "piece work" basis, and are more frequently subject to deductions for loss of time.

Even if it be clear that the compensation to be paid by your department is not salary, there is still another question to be considered. In return for the salary paid by the Commonwealth to a member of the General Court the Commonwealth is entitled to so much of the member's time and effort as is requisite for the performance of his duties. In order, therefore, that a member of the General Court should be employed in your department, it should be clear that the work required would in no way interfere with his duties as a member of the General Court. The work required by your department would have to be in the nature of overtime work. See II Op. Atty. Gen. 309; V Op. Atty. Gen. 697. This is a question of fact which you would have to determine, in the exercise of sound discretion.

In order, therefore, to make the employment suggested, you would have to determine, first, that the compensation to be paid would not be "salary"; and, secondly, that the work to be performed would be in the nature of overtime work and would in no way infringe upon the member's duties as a legislator.

GASOLINE — STATE FIRE MARSHAL — POWERS — APPEAL
— “PERSON AGGRIEVED” — REVOCATION OF PERMITS
— STREET COMMISSIONERS OF BOSTON.

The use of land for the keeping, storage and sale of gasoline, in the absence of a restrictive statute, is lawful.

The powers of the State Fire Marshal, being purely statutory, can be exercised only in accordance with the statute.

If the State Fire Marshal delegates his power to grant licenses or permits, and the delegated officer acts thereunder, the Fire Marshal has no power to hear and determine the question except on appeal by a “person aggrieved.”

A “person aggrieved” is one whose personal or property rights are or may be adversely affected in a special manner by the action of the licensing authority.

A person whose rights may be affected only in so far as he is a member of the general public, and only to the same extent as other members of the public, is not a “person aggrieved.”

The State Fire Marshal may revoke any permit, but such revocation cannot be made arbitrarily.

The street commissioners of Boston have no authority to issue permits to store, handle or sell gasoline except as the State Fire Marshal delegates such authority to the board.

To the Com-
missioner of
Public Safety.
1924
June 20.

You request my opinion whether the State Fire Marshal has jurisdiction to pass upon the action or order of the board of aldermen of Chelsea granting a license for the storage of gasoline, under power duly delegated by the State Fire Marshal, on an appeal, which does not recite, or in which the evidence, after hearing, does not disclose, the appellant to be a person aggrieved by reason of any special personal or property right injuriously affected by said action or order.

G. L., c. 148, § 30, provides, in part: —

The marshal shall have within the metropolitan district the powers given by section ten, . . . to license persons or premises, or to grant permits for, . . . the keeping, storage, use, . . . sale, handling . . . of . . . crude petroleum or any of its products . . .

Section 31, as amended by St. 1921, c. 485, § 5, provides: —

The marshal may delegate the granting and issuing of any licenses or permits authorized by sections thirty to fifty-one, inclusive, . . . to the head of the fire department or to any other designated officer in any city

or town in the metropolitan district. . . . Any such permit may be revoked by the marshal or by the officer designated to grant it.

Acting under this section the Fire Marshal delegated the granting and issuing of licenses in Chelsea to the board of aldermen of that city.

Section 28 provides that "the metropolitan district shall include . . . Chelsea."

Section 45 provides:—

The marshal shall hear and determine all appeals from the acts and decisions of the heads of fire departments and other persons acting or purporting to act under his authority, done or made or purporting to be done or made under the provisions of sections thirty to fifty-one, inclusive, and shall make all necessary and proper orders thereon. Any person aggrieved by any such action of the head of a fire department or other person may appeal to the marshal.

The use of land for the keeping, storage and sale of gasoline, in the absence of a restrictive statute, is lawful. The statute under which licenses or permits for such purposes are required and granted is a regulation of the right of ownership in land.

In *General Baking Co. v. Street Commissioners*, 242 Mass. 194, 196, the court said:—

The building of a garage, when there is no restrictive statute, is a lawful improvement of land. When limitation upon that right is imposed, it is reasonable to presume a purpose by the Legislature that the landowner be furnished by the terms of the law with necessary information touching all the restrictions under which he must act. When permission is obtained, the landowner reasonably may infer that, so long as he complies with the requirements under which the privilege has been granted, he may claim protection until further legislation impairs his rights.

It follows that the restrictions placed upon the use of land for such purposes must not be broader in scope than the statute authorizes. The powers of the State Fire Marshal, being purely statutory, can be exercised only in accordance with the statute. *Welch v. Swasey*, 193 Mass. 364, 376;

Commonwealth v. Maletsky, 203 Mass. 241; *Goldstein v. Conner*, 212 Mass. 57; *Kilgour v. Gratto*, 224 Mass. 78; *Wright v. Lyons*, 224 Mass. 167, 168; *Commonwealth v. McCarthy*, 225 Mass. 192, 195; *Commonwealth v. Atlas*, 244 Mass. 78, 82. The statute prescribes only two methods of action by the Fire Marshal upon the question of such licenses or permits. He may pass on the question himself, in the first instance, or he may delegate the authority to a local officer, and hear and determine appeals from the action of such officer made by any person aggrieved. If the Fire Marshal delegates the power to grant licenses or permits, and the delegated officer acts in a specific instance, the Fire Marshal has exhausted his power to pass upon the matter as an original question, and his only power then is to hear and determine an appeal from the action of the delegated officer, when made by a person aggrieved.

I am not unmindful of a contrary opinion given by my predecessor, to the effect that the Fire Marshal may pass upon the question as if no delegation had been made. See VI Op. Atty. Gen. 329. That opinion, however, was rendered prior to the opinion of the Supreme Judicial Court in *General Baking Co. v. Street Commissioners*, 242 Mass. 194. I cannot, therefore, concur with the opinion of my predecessor. In my opinion, the Fire Marshal, in the case you present, has no authority to pass upon the question of granting the license. He should, however, hear and determine the appeal, if properly made.

The right of appeal is, by section 45, given only to persons "aggrieved" by the action of the board of aldermen, and not to others. A person aggrieved, within the purview of the statute, is one whose personal or property rights are or may be adversely affected in a special manner by the action of the board. *Wiggin v. Swett*, 6 Met. 194, 197; *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 101; *Pierce v. Gould*, 143 Mass. 234; *Norton v. Shore Line Electric Ry. Co.*, 84 Conn. 24, 33. A person whose rights may be affected only in so far as he is a member of the general

public, and only to the same extent as other members of the general public, is not a person "aggrieved," within the meaning of the act. *Wesson v. Washburn Iron Co.*, *supra*.

The appeal from the action of the board of aldermen was not made by a person who was specially affected in his personal or property rights. I am accordingly of the opinion that there is no lawful appeal pending, and that you have no authority to pass upon the action of the board of aldermen.

I deem it my duty to call your attention to G. L., c. 148, § 31, as amended by St. 1921, c. 485, § 5, which authorizes you to revoke any permit authorized by sections 30 to 51, inclusive. Such revocation cannot, however, be made arbitrarily. *Welch v. Swasey*, 193 Mass. 364, 376; *Commonwealth v. McGann*, 213 Mass. 213, 215; *Commonwealth v. Slocum*, 230 Mass. 180, 192; *Yick Wo v. Hopkins*, 118 U. S. 356.

You further request my opinion as to whether the State Fire Marshal has jurisdiction to review and to overrule, on appeal, the decision of the board of street commissioners of the City of Boston, without regard to the provisions of St. 1907, c. 584, in granting a license to store gasoline in an underground tank and a license to install a pump permanently at the curb of the sidewalk in a public street, said board having been delegated by the State Fire Marshal with power to grant licenses or permits for the keeping, storage and sale of gasoline.

St. 1907, c. 584, is an act relative to the use of the public streets of the city of Boston for the storage and sale of merchandise. By the provisions of G. L., c. 148, § 30, the Fire Marshal is given authority to regulate the storage, keeping, use, sale and handling of gasoline in the metropolitan district, which includes Boston. The street commissioners of Boston have no authority to issue permits for such purposes except as the Fire Marshal delegates such authority to the board. *Foss v. Wexler*, 242 Mass. 277, 279; V Op. Atty. Gen. 718; VI Op. Atty. Gen. 580.

The board of street commissioners, in granting a permit to store, use and sell gasoline, acted solely by virtue of the authority delegated to it by the Fire Marshal under the provisions of G. L., c. 148, § 31, as amended by St. 1921, c. 485, § 45. Under the provisions of section 45 an appeal from the action of the board may be made to the Fire Marshal by any person aggrieved. The powers of the Fire Marshal in this respect are in nowise affected by St. 1907, c. 584. If an appeal from the action of the board has been made by a person aggrieved by such action, it is the duty of the Fire Marshal to hear and determine such appeal, without regard to St. 1907, c. 584.

STATE CONSTITUTION — BLUE BOOK.

Mass. Const., pt. 2nd, c. VI, art. XI, does not require that the constitution be printed in the Blue Book.

To the
Secretary.
1924
June 21.

You request my opinion as to whether or not the provisions of Mass. Const., pt. 2nd, c. VI, art. XI, require that you shall print the Constitution in the Blue Book, notwithstanding the provisions of St. 1924, c. 462.

In my opinion, you are not required to do so.

The provision of the Constitution to which you refer reads as follows:—

This form of government shall be enrolled on parchment and deposited in the secretary's office, and be a part of the laws of the land — and printed copies thereof shall be prefixed to the book containing the laws of this commonwealth, in all future editions of the said laws.

It is my opinion that the editions referred to are books which purport to contain all the statutes of the Commonwealth, and not books containing only the laws of one or more sessions.

At the time of the adoption of the Constitution it was the custom to publish the laws of each session by annexing them as part of an existing book of laws, until a book became

of sufficient bulk to make it desirable that a new book be started. One book, entitled "Massachusetts Perpetual Laws," contained all the laws passed from 1692 to 1774. A book of a similarly comprehensive nature was, no doubt, referred to by the phrase "the book containing the laws of this commonwealth," as used in article XI above cited.

My opinion that article XI does not refer to a publication of the acts passed at a particular session is confirmed by the practice followed after the adoption of the Constitution.

For many years after the adoption of the Constitution it was the unvarying practice not to include the Constitution in the publication of the laws of one or more sessions. The inclusion of the Constitution in such books as purported to comprise all the then existing laws forms no exception. (See Laws, Oct., 1780, to Jan., 1783; Perpetual Laws of the Commonwealth, 1780-1789; General Laws to 1822; Revised Statutes, 1836.)

Apparently the first Blue Book in which the Constitution was printed was for the year 1855. The Constitution was printed at the end of the Blue Books for the years 1855, 1856 and 1857. It was not included in the Blue Book for 1858. It was prefixed to the Blue Book for 1859.

The various resolves under which the acts were published prior to the General Statutes (1860) made no provision for printing the Constitution. (See Res. Jan. 20, 1808; Res. Jan. 16, 1812; Res. 1839, c. 83.)

G. S. (1860), c. 3, § 1, provided for the printing of the Constitution and other matter with the acts and resolves of each session. In the report of the commissioners on revision of the statutes, published in 1858, the commissioners state in a note to chapter 3, section 1, that they have therein provided for the publication of the acts and resolves of each session, "with such other matter as it has been the custom to publish with them." The custom of publishing the Constitution seems not to have been of long standing.

The statutory requirement for printing the Constitution as part of the Blue Book, which has existed since the General

Statutes of 1860 (see G. L., c. 5, § 2), has been repealed by St. 1924, c. 462; and there seems to be no other provision making this requirement.

ANIMAL INDUSTRY — QUARANTINE STATIONS — TUBERCULIN — DISPOSITION OF DISEASED ANIMALS.

Department Order No. 35 of the Department of Conservation, Division of Animal Industry, created a valid quarantine of the premises of the Brighton Stock Yards Company in Brighton.

Quarantine is a proper means of enforcing the power of inspection and examination. The tuberculin test may be applied without the owner's consent to imported cattle and to domestic cattle reported tuberculous on physical examination by a veterinary.

Quarantine stations established under G. L., c. 129, § 8, are experimental stations for the study of animal diseases.

Quarantine stations in Brighton, Watertown and Somerville, G. L., c. 129, § 32, are general quarantines to facilitate inspection, and the tuberculin test may be used upon cattle in such stations without the owner's consent.

Prior to St. 1924, c. 156, the sale of tuberculous animals was unrestrained, except that the owner must provide the buyer with certain information; after St. 1924, c. 156, sale or other disposition by the owner, except for immediate slaughter, is forbidden.

To the Com-
missioner of
Conservation.
1924
June 25.

The questions which you have referred to me, relative to the quarantining of the Brighton Stock Yards and to the use of tuberculin in testing cattle on those premises, are predicated on the following facts: —

That there is maintained at the Brighton Stock Yards a large distributing centre for cattle, at which a weekly market is held for trading in dairy animals; that some of these cattle are brought from without the State, and that others of them are in the course of a purely intrastate movement; that an important part of the work of your department in controlling the spread of disease consists of determining whether all such cattle, or such of them as to which it may legally be done, are affected with tuberculosis; and that the only certain method of determining the presence or absence of tuberculosis is the use of the tuberculin test.

1. You ask whether the Brighton Stock Yards, as a "premises," are legally under quarantine by Department

Order No. 35, approved in Council April 3, 1918. This order provides, in section 2, that "the premises of the Brighton Stock Yards Company in Brighton, within the city of Boston, . . . are hereby declared to be quarantine stations, and no animals are to be released therefrom except by permission of the Director of Animal Industry or an agent of the division."

Under G. L., c. 129, § 2, the Director of Animal Industry is authorized to —

make and enforce reasonable orders, rules and regulations relative to . . . prevention, suppression and extirpation of contagious diseases of domestic animals; the inspection, examination, quarantine, care and treatment or destruction of domestic animals affected with or which have been exposed to contagious disease, . . . No rules or regulations shall take effect until approved by the governor and council.

Under G. L., c. 129, § 7, plenary power is given to the director or his agents or an inspector to make examinations or to inspect animals or the places where they are kept. Under section 11, as amended by St. 1922, c. 353, the director or one of his agents, upon determination that a domestic animal is affected with a contagious disease, may, if he is of opinion that the public good so requires, cause the diseased animal to be isolated or killed.

I am of the opinion that a rule establishing a quarantine about such a place as the Brighton Stock Yards, where the director and his aids have an unquestioned right to exercise their power of inspection and examination on the premises, is not an unreasonable method of facilitating such examination or inspection, and is therefore warranted under G. L., c. 129, § 2. The same view would apply to the provision requiring that no animals be released from the quarantined premises except by permission of the director or one of his agents. I am not, of course, dealing with any case of possible arbitrary action under such a ruling. The Brighton Stock Yards, therefore, can be said to be legally under quarantine by Department Order No. 35. It should

be pointed out, however, that this consequence is deduced from the department order by assuming that the words "quarantine stations" were not used by the director in the narrow sense in which they are used in G. L., c. 129, § 8, which section is further discussed below.

2. You ask whether, if the Brighton Stock Yards are legally under quarantine, the Director of Animal Industry has authority, under G. L., c. 129, § 32, to order that any and all cattle thereon be tested with tuberculin for the purpose of determining whether or not they are affected with tuberculosis. Section 32 prohibits the use of tuberculin as a diagnostic agent for the detection of tuberculosis in domestic animals except upon cattle brought into the Commonwealth, upon cattle "in quarantine stations at Brighton, Watertown and Somerville," upon any animal in any other part of the Commonwealth where the written consent of the owner or person in possession is obtained, and upon animals which have been reported as tuberculous upon physical examination by a competent veterinary surgeon. Clearly, this statute gives the right to use the tuberculin test without the owner's consent upon all foreign cattle coming into the Commonwealth and upon any domestic cattle which have been reported tuberculous upon physical examination by a veterinary. There is more difficulty as to the meaning of the words "in quarantine stations at Brighton, Watertown and Somerville."

G. L., c. 129, § 8, provides that the director may establish "hospitals or quarantine stations, with proper accommodations, wherein, under prescribed regulations, animals selected by him may be confined and treated for the purpose of determining the characteristics of a specific contagion and the methods by which it may be disseminated or destroyed."

In this section the words "quarantine stations" appear for the only time in G. L., c. 129, except as in section 32 quoted above. They are clearly used in section 8 with a narrow significance, as experimental stations where selected animals may be kept under observation and treat-

ment in order to enable the department to acquire additional knowledge about the problems with which it has to deal. It is a natural construction to assume that the words "quarantine stations" in section 32 were used with the same significance which they plainly have in the only other place where they appear in the chapter. Such a construction would have a rational background, for the Legislature might well have intended to except cattle in such stations from the operation of section 32, so that the experimental work might not be hampered by inability to use tuberculin. The effect of this construction would be that tuberculin could not be used upon Massachusetts cattle brought to the Brighton Stock Yards unless with the owner's consent, or except after they are reported as tuberculous by a veterinary; unless in some portion of the Brighton Stock Yards which may have been properly established as a hospital or quarantine station, as those terms are narrowly used in section 8.

The foregoing would seem a proper interpretation if G. L., c. 129, be divorced from its historical background. It seems to me, however, although it is not free from doubt, that the way in which these statutes have grown indicates that the Legislature intended to use the words "quarantine stations" with a different significance in section 32 from that with which those words are used in section 8. The discussion in the following two paragraphs will show the grounds for this conclusion.

By St. 1860, c. 221, § 3, the power was originally created to "provide for the establishment of a hospital or quarantine in some suitable place or places, with proper accommodations of buildings, land, etc., wherein may be detained any cattle by them selected, so that said cattle so infected or exposed may be there treated by such scientific practitioners of the healing art as may be appointed to treat the same." The substance of this provision, although altered somewhat in the numerous acts which intervene between St. 1860 and G. L., c. 129, § 8, has not varied materially for our present

purposes. In P. S., c. 90, § 14, the words "a hospital or quarantine" are still found. In St. 1887, c. 252, § 11, the words are "hospitals or quarantines." These words are also in St. 1894, c. 491, § 41. In St. 1899, c. 408, § 6, are found for the first time the words "hospitals or quarantine stations." These words remain unchanged in G. L., c. 129, § 8. There seems no reason to believe that any substantial meaning is to be attached to the change from the term "quarantines" to the term "quarantine stations," or that the term "quarantine stations," as first used in the statute of 1899 or as now found in section 8, was intended to have any very technical significance.

The history of G. L., c. 129, § 32, followed a somewhat similar course. In the original statute of 1895, chapter 496, section 14, the use of tuberculin is prohibited except (among other exceptions) as to "all cattle held in quarantine at Brighton, Watertown and Somerville." In St. 1896, c. 276, the same words are found. In St. 1897, c. 165, the words are "to all cattle at Brighton, Watertown and Somerville," the words "held in quarantine" being deliberately stricken out. St. 1899, c. 408, § 42, uses words similar to those in the preceding statute. Similarly, in R. L., c. 90, § 31, and in St. 1903, c. 322. The present change was made in the report of the commissioners consolidating and revising the General Laws, and there are no annotations in the report to explain the change.

I am therefore of the opinion that G. L., c. 129, § 32, authorizes the use of tuberculin in tests made upon Massachusetts cattle brought upon the premises at Brighton, which are designated as "quarantine stations," in the sense in which those words are used in that section and in which I have assumed them to be used in Department Order No. 35.

3. You ask whether, if the test shows animals to be diseased, the director can prohibit their sale at these premises. G. L., c. 129, § 33A. If the director does not see fit to take advantage of the provisions of G. L., c. 129,

§ 11, authorizing the killing of animals found upon examination to be affected with contagious disease, the only alternative regulation is found in section 33A (St. 1922, c. 137). This latter section provides, in substance, for the marking of the animal for identification, by a metal tag, and that any person who sells, exchanges or otherwise disposes of an animal which to his knowledge has reacted to a tuberculin test shall furnish the person to whom he disposes of the animal with a true copy of the record of the test or a written statement of the fact of such reaction.

St. 1924, c. 156, strikes out section 33A of G. L., c. 129, as amended, and substitutes a provision that the reacting animal shall be tagged for identification, and that no person shall dispose of an animal which has reacted to a tuberculin test except for the purpose of immediate slaughter. This latter statute, however, which was approved March 28, 1924, is not yet in effect. It would seem that while section 33A remains in effect the only alternatives which the director has are to have the animal killed under his own authority or to permit its owner to dispose of it in any way that he pleases, subject to the duty to inform any transferee of the condition of the animal. The director cannot in any direct fashion prohibit the sale at the premises of such animals. When St. 1924, c. 156, shall be in effect the director will still have the former option of having the animal killed, under section 11, or he may permit the owner or possessor to return it to his own premises; but any sale or other disposition by the owner or possessor, except for the purpose of immediate slaughter, will be prohibited.

RETAIL DRUG STORE — REGISTRATION AND PERMIT —
PEDDLING PATENT MEDICINES AND DRUG SUNDRIES.

A registered pharmacist who maintains no fixed place of business but travels about selling patent medicines and drug sundries from an automobile truck, on the side of which is a sign containing his name and the words, "Registered Pharmacist. Everything in the Drug Line," is not conducting a "store" within the meaning of G. L., c. 112, § 38, as amended by St. 1921, c. 318, and accordingly is not required to obtain a permit as therein provided.

It seems that such a person would require a license for hawkers and pedlers under G. L., c. 101.

To the Board
of Registration
in Pharmacy.
1924
June 25.

You ask my opinion as to whether G. L., c. 112, § 38, as amended, is violated by a registered pharmacist who maintains no fixed place of business, but who, without a permit under said section, travels about selling patent medicines and drug sundries from an automobile truck owned by him, on the side of which is a sign containing his name and the words "Registered Pharmacist. Everything in the Drug Line."

G. L., c. 112, § 38, as amended by St. 1921, c. 318, reads as follows:—

No store shall be kept open for the transaction of the retail drug business, or be advertised or represented, by means of any sign, or otherwise, as transacting such business, unless it is registered with, and a permit therefor has been issued by, the board, as provided in the following section. The permit shall be exposed in a conspicuous place in the store for which it is issued.

If it be assumed, as a matter of fact, that the articles sold are of a kind which makes their sale "drug business" within the definition of G. L., c. 112, §§ 35 and 37, still section 38, above quoted, by its terms requires a permit only for a "store"; and, in my opinion, a court would not construe said section 38 as covering the transaction in question. See *Commonwealth v. McMonagle*, 1 Mass. 517; *Hittinger v. Westford*, 135 Mass. 258; *Barron v. Boston*, 187 Mass. 168.

I might suggest that the man to whom you refer would seem to require a license for hawkers and pedlers under G. L., c. 101.

PUBLIC SCHOOLS — DEPARTMENT OF EDUCATION — STATE
REIMBURSEMENT — SCHOOL BUILDINGS AND EQUIP-
MENT.

The Department of Education is empowered to withhold State reimbursement due to a town under G. L., c. 70, pt. II, when such town neglects to furnish its school buildings with all or any of the forms of equipment required by law.

You ask my opinion in the following language: —

I desire your opinion as to whether, under the statutes quoted above, the department is directed to withhold the State reimbursement due any town under G. L., c. 70, pt. II, in case the town neglects to furnish its school buildings with such heating, lighting, ventilating, seating and sanitary facilities as in the opinion of the department are necessary for the comfort and health of the pupils.

To the Com-
missioner of
Education.
1924
July 18.

The provisions of the statutes to which you refer in the earlier part of your communication are G. L., c. 71, § 68, and G. L., c. 70, §17.

I am of the opinion that the provisions of these two statutes give your department the power to withhold State reimbursement due to a town under G. L., c. 70, pt. II, when such town neglects to furnish its school buildings with all or any of the forms of equipment specifically mentioned in your letter. Such forms of equipment in proper quantities or amount are necessary to the reasonable comfort of pupils; the laws relating to public schools already referred to make it incumbent upon towns or school committees to provide them. Failure to provide them is a failure to comply with a part of the laws relating to public schools. Your department is charged with the duty of withholding the said funds when all the laws relating to public schools have not been complied with. Compliance must be of such a character as to satisfy your department, in the exercise of its reasonable judgment, that the provisions of the public school laws have been fulfilled.

LEASE — SUBLEASE — FISH PIER.

A lease by the Board of Harbor and Land Commissioners to the Boston Fish Market Corporation of parts of the Commonwealth flats, under R. L., c. 96, § 3, gives to the lessee every right which it would have had if the lessor had been a person or private corporation.

A covenant in a lease that the lessee will not, without the consent of the lessor first obtained in writing, assign the lease is not a covenant against underletting, and will not be violated by the making of a sublease of a portion of the premises. Under the lease referred to, the lessee has the right to sublet a portion of the premises for the storage of fuel oil and gasoline.

To the Com-
missioner of
Public Works.
1924
July 24.

You have asked me to advise you whether the Boston Fish Market Corporation, being the lessee of the property known as the Fish Pier in South Boston, has a right under the lease to sublease any portion of the premises to another corporation for the establishment and operation of fuel oil and gasoline storage.

The lease was executed September 24, 1910, between the Commonwealth of Massachusetts, acting by its Board of Harbor and Land Commissioners, as lessor, and the Boston Fish Market Corporation, as lessee. By it certain parts of the Commonwealth flats at South Boston, as therein bounded and described, were demised and leased to the corporation. The lease contains, among other covenants, the following covenant by the lessee:

And the said lessee further covenants and promises with and to the said lessor that it or others having its estate in the premises will not, without the consent of the lessor first obtained in writing, assign this lease, nor make nor allow to be made any unlawful or improper use of the leased premises.

This lease was executed by the Harbor and Land Commissioners under the authority of R. L., c. 96, § 3, which contains the provision that —

. . . It (the Board of Harbor and Land Commissioners) may make contracts for the improvement, filling, sale, use or other disposition of the lands at and near South Boston known as the Commonwealth flats, may lease any portion thereof with or without improvements thereon, for such periods and upon such terms as it shall deem best . . .

In *Boston Fish Market Corp. v. Boston*, 224 Mass. 31, this very lease was under consideration, and the court said:—

The plaintiff is the lessee of the land for which it has been taxed within the meaning of the statute. It is described as “lessee” throughout the indenture under which it holds possession. That indenture is in the form of a lease. It is aptly phrased to create the relation of lessor and lessee. The harbor and land commission had the power to execute a lease. R. L., c. 96, § 3.

In *Cotting v. Commonwealth*, 205 Mass. 523, it was held that under R. L., c. 96, § 3, the Board of Harbor and Land Commissioners has the power to make a deed of a parcel of land included in the Commonwealth flats with covenants of seisin, against incumbrances, of right to convey and of warranty.

It is my opinion that the lessee under this lease acquired every right which it would have had if the lessor had been a person or private corporation and not the State.

There is no express restriction in the lease limiting the purposes for which the leased property may be used, unless such restriction is found in the part already quoted. The covenant that the lessee will not make nor allow to be made any unlawful or improper use of the leased premises I regard as intended to describe such use as offends against some law, regulation or ordinance. In my opinion, it does not cover the use mentioned in your letter.

The covenant that the lessee will not, without the consent of the lessor first obtained in writing, assign the lease is not a covenant against underletting and will not be violated by the making of a sublease of a portion of the premises. The authority for this proposition seems clear. *Crusoe v. Bugby*, 3 Wills. 234; *Jackson v. Silvernail*, 15 Johns. (N. Y.) 278; *Jackson v. Harrison*, 17 Johns. (N. Y.) 66; *Den v. Post*, 25 N. J. L. 285; *Hargrave v. King*, 40 N. C. 430; *Cross v. Bouck*, 175 Cal. 253; Taylor, Landlord and Tenant, § 403; 24 Cyc. 974. On the question whether a covenant not to underlet forbids an assignment the authority is divided.

See *Greenway v. Adams*, 12 Ves. Jr. 395, and *Den v. Post*, *supra*, in the affirmative, and *Field v. Mills*, 33 N. J. L. 254, in the negative. It seems to have been assumed in some Massachusetts cases that a covenant not to underlet forbids an assignment. *Blake v. Sanderson*, 1 Gray, 332; *Shattuck v. Lovejoy*, 8 Gray, 204; *Bemis v. Wilder*, 100 Mass. 446; see Hall, Massachusetts Landlord and Tenant, § 26. But whatever may be the scope of a covenant not to underlet, the rule that a covenant not to assign is not broken by a sublease seems to be clearly established.

I must advise you, therefore, that there seems to be no legal objection to the making of a lease by the Boston Fish Market Corporation of a portion of the Fish Pier to another corporation for the establishment and operation of fuel oil and gasoline storage.

DOMICIL — CHANGE OF DOMICIL OF MINOR CHILD.

The domicil of an infant whose father has died and whose mother has married again does not change with the mother's change of domicil, even though he accompany his mother to the new place of abode.

A widowed mother who has remarried cannot change the domicil of her minor child to another State, although she is also guardian by court appointment.

If such a mother were also testamentary guardian, it seems that she would have power to change the domicil of her minor child.

You request my opinion upon the following questions of domicil: —

Has a widowed mother who, with her minor child, has been domiciled in one State, and who remarries and takes the child to live with her in the home of her second husband, located in another State, the power to change the domicil of such minor child in each of the following cases, assuming that she intends to keep the child with her in her new home?

1. When she is acting as a natural guardian only, not having received a court appointment as guardian?

2. When she is acting as a guardian with custody of the child by appointment of a court but not in accordance with the terms of a will?

3. When she is acting as a guardian of the child having been appointed by a court under the terms of the will of its deceased father?

Generally speaking, an infant, unless emancipated, has a derivative domicile. His domicile at birth is that of his father, and changes with his father's change of domicile, whether father and child dwell together or apart. This rule results from the relation of the father as the head of the family, whose domicile draws after it that of his wife and minor children. Upon the death of the father the mother usually becomes the head of the family, and therefore it would seem that the domicile of her minor children should follow hers, at least so long as she remains a widow. The rule has frequently been stated without qualification that under such circumstances the domicile of an infant follows that of his mother. *Pottinger v. Wightman*, 3 Meriv. 67; *Dedham v. Natick*, 16 Mass. 135; *Lamar v. Micou*, 112 U. S. 452, 470. In other cases, however, the view has been held that the domicile of an infant under such circumstances does not necessarily follow that of the mother but depends upon her intention as shown by the facts of the case, and particularly the fact of the infant's actual residence with or apart from his mother. *Brown v. Lynch*, 2 Bradf. (N. Y.) 214; *In re Beaumont*, (1893) 3 Ch. 190, 195; Dicey on Domicil, pp. 98, 99.

Whatever may be the law in this State upon that question, it seems clearly enough settled that the domicile of an infant does not follow that of his mother upon her second marriage and consequent change of domicile, but that the infant retains his previous domicile even though he accompany his mother to the new place of abode. *Freetown v. Taunton*, 16 Mass. 52; *Lamar v. Micou*, 112 U. S. 452, 470, 471; *School Directors v. James*, 2 Watts. & S. 568; *Johnson v. Copeland*, 35 Ala. 521; *Mears v. Sinclair*, 1 W. Va. 185; Jacobs, Law of Domicil, § 244. There is some authority to the contrary. *Wheeler v. Hollis*, 19 Tex. 522; *In re Beaumont*, (1893) 3 Ch. 490, 497. I do not, however, regard these cases as controlling in view of the decisions expressly to the contrary in cases cited above. I therefore answer your first question in the negative.

The question to what extent a guardian has the power to change the domicile of his minor ward is a complicated one, involving distinctions which must be borne in mind and considerable conflict of authority. It is clear that a minor ward does not take the domicile of his guardian as a matter of law. *School Directors v. James*, 2 Watts. & S. 568; Jacobs, Law of Domicil, § 256. It is clear, also, that a guardian having the custody of a minor ward by appointment of a court has the power to change the ward's domicile from one county to another within the State — his municipal domicile as it is called. *Holyoke v. Haskins*, 5 Pick. 20; *Kirkland, v. Whately*, 4 Allen, 462; *Lamar v. Micou*, 112 U. S. 452, 472; *Ex parte Bartlett*, 4 Bradf. (N. Y.) 221; Jacobs, Law of Domicil, §§ 257, 260. On the other hand, it has been said to be very doubtful whether a guardian not the natural or testamentary guardian of a minor ward can change the ward's domicile to another State. *Lamar v. Micou*, 112 U. S. 452, 472; *Daniel v. Hill*, 52 Ala. 430, 435; Jacobs, Law of Domicil, §§ 260, 263. *Pedan v. Robb's Adm'r*, 8 Ohio, 227, and *Townsend v. Kendall*, 4 Minn. 412, holding the contrary, seem not to be well considered. If a guardian not a natural guardian cannot change the domicile of his ward under those circumstances, and if a widowed mother upon her remarriage cannot change the domicile of her minor child, it is my opinion that such a mother, although she is also guardian by court appointment, cannot affect her child's domicile. I therefore answer your second question in the negative.

A testamentary guardian of a minor ward, appointed by the will of the ward's father, seems to be accorded greater power over his ward's domicile. In that respect such a guardian seems to be regarded as standing to a considerable extent in the shoes of the father himself, although still the domicile of the ward does not follow that of the guardian as a derivative domicile. In *White v. Howard*, 52 Barb. 294, 318, the domicile of an infant was held to have been changed by the appointment by his father of a testamentary

guardian residing in another State, and a direction in the will that the infant should reside in that State under the care of the guardian during minority. The suggestion is made in *Lamar v. Micou*, 112 U. S. 452, 471, that "a testamentary guardian nominated by the father may have the same control of the ward's domicile that the father had." It was held in *Delaware, L. & W. R. Co. v. Petrowsky*, 250 Fed. 554, 563 (C. C. A., 2nd Cir.), that "a testamentary guardian nominated by the father has the same control over the ward's domicile that the father had, and may in good faith change it either from one State to another State or from one county to another county in the same State." On the other hand, in *Mears v. Sinclair*, 1 W. Va. 185, the mother, whose change of domicile upon her second marriage was held not to change the domicile of her infant, was also his testamentary guardian. See Jacobs, Law of Domicil, §§ 260, 263.

It is impossible to answer your third question with any degree of certainty. My advice upon that point is that it seems slightly more probable that under the circumstances assumed by you the mother has the power to change the domicile of her minor child.

BURIAL EXPENSES FOR PERSONS DYING FROM CERTAIN CONTAGIOUS DISEASES — OVERSEERS OF THE POOR — LOCAL BOARDS OF HEALTH.

Where a local board of health has acted in a case involving a contagious disease deemed to be dangerous to the public health and reportable under G. L., c. 111, such board shall retain exclusive control of each such case until it is fully terminated. The responsibility of the board of health is not terminated by the death of a patient suffering from such disease, but necessarily includes the duty of supervising and providing for the proper burial of the patient.

You request my opinion as to whether local overseers of the poor or local boards of health are charged with the duty of payment of burial expenses for persons dying from the following contagious diseases: Actinomycosis, measles,

To the Com-
missioner of
Public Health.
1924
July 28.

tetanus, trichinosis, tuberculosis, typhoid fever, varicella and whooping cough.

You state that a local board of health has voted that it does not consider these diseases "contagious after death," and that the overseers of the poor are, accordingly, the ones to whom to apply for burial if the family is without means to provide therefor.

G. L., c. 111, provides that the Department of Public Health shall define what diseases shall be deemed to be dangerous to the public health, and outlines the duties of local boards of health with respect to such diseases. Section 32 of said chapter provides: —

A board of health shall retain charge, to the exclusion of the overseers of the poor, of any case arising under this chapter in which it has acted.

This department has, accordingly, ruled in an opinion of my predecessor (VI Op. Atty. Gen. 433) that in any case involving a disease which the Department of Public Health has declared to be dangerous to the public health and which, accordingly, is to be reported under G. L., c. 111, § 112, and a local board of health has acted in the matter, such local board of health shall retain charge thereof, including whatever support may be necessary, to the exclusion of the overseers of the poor.

While it is true that in general the duty of providing for the decent burial of deceased persons without means is imposed upon the overseers of the poor (see G. L., c. 117, §§ 14 and 17), nevertheless, the legislative intent appears to be clear that where a local board of health has acted in a case involving a contagious disease deemed to be dangerous to the public health and reportable under the provisions of G. L., c. 111, such board of health shall retain exclusive control of each such case until it is fully terminated. Having in mind the purpose of the statute and the dangers to be safeguarded in the interest of the public health, I am of the opinion that the responsibility of the board of

health is not terminated by the death of such a patient while suffering from such disease, but that such responsibility necessarily includes the duty of supervising and providing for the proper burial of the patient, and I so answer your inquiry.

METROPOLITAN DISTRICT COMMISSION — REPAIR OF BRIDGE — CARE AND CONTROL — HARVARD BRIDGE.

Under St. 1924, c. 442, providing for the repair of the Harvard Bridge, the Metropolitan District Commission was constituted a public agency for the specific purpose of repairing the bridge, and the bridge was placed under the care and control of the Commission from and after the time of the completion of the work.

While the work of repairing said bridge is proceeding, the board of commissioners appointed under St. 1898, c. 467, and not the Commission, is responsible for the policing, control and maintenance of portions of the bridge kept open for public travel, and the cities of Boston and Cambridge, and not the Commonwealth, are liable under that statute for damages to persons traveling on the bridge, arising out of any defect or want of repair.

You ask my opinion upon certain questions arising under St. 1924, c. 442, providing for the repair of the bridge in Massachusetts Avenue across Charles River Basin, known as the Harvard Bridge. By section 1 of this statute the Metropolitan District Commission is authorized and directed to strengthen, repave and repair the bridge and to alter the draw span therein, for which purposes it is authorized to expend not exceeding \$600,000. Sections 2, 3 and 4 provide for the payment and assessment of expenses. Section 5 is as follows: —

To the Metro-
politan District
Commission.
1924
August 4.

When the work herein authorized shall have been completed, said bridge shall be maintained as a public highway and, so far as consistent with such purpose, the metropolitan district commission shall have over the same all the powers and authority and be subject to the liability now conferred and imposed upon said commission in respect to the care, control and maintenance of roadways and boulevards under its care and control, and the cost of maintenance of said bridge and approaches shall be paid as a part of the cost of maintenance of boulevards by said commission.

You state that the Metropolitan District Commission proposes to repair a part of the bridge at a time, allowing public travel to continue on the rest of the bridge not under repair, and that when the statute was passed the bridge was policed and maintained under St. 1898, c. 467, by a board of two commissioners, one appointed by the mayor of Boston and one by the mayor of Cambridge, and all damages recovered by reason of any defect or want of repair therein were paid by said cities equally.

You ask my opinion on the following questions: —

First, whether the board of commissioners of the Boston and Cambridge bridges, appointed by the cities of Boston and Cambridge under the act of 1898, or the Metropolitan District Commission is responsible for the policing, control and maintenance of the portions of the bridge kept open for public travel during the prosecution of the work required by the act of 1924, and whether liability for damages to persons traveling on the bridge, arising out of any defect or want of repair in such traveled portions, would rest upon the cities of Boston and Cambridge or upon the Commonwealth; second, if the obligation of policing, maintenance and repair of the traveled portions during the progress of the work rests upon the Metropolitan District Commission, whether the Commission may spend money out of the appropriation made by the act of 1924 for the purpose of policing, lighting and temporary repairs of the traveled portions of the bridge; third, whether the Commission, prior to the completion of the work, has authority to grant the petition of the Boston Elevated Railway Company for a double-track street railway location on the bridge, as an alteration of and in addition to its existing location granted originally by the cities of Boston and Cambridge; fourth, if the Commonwealth is liable for maintenance of the part of the bridge used for public travel during the progress of the work, whether, under authority of St. 1923, c. 358, it may require the Boston Elevated Railway Company to pay the cost of paving and other surface material on the portions of the bridge occupied by its tracks; and, fifth, if there is liability on the part of the Commonwealth for damages due to defects in the surface of parts of the bridge left open to public travel, what action the Commission may take to safeguard the interests of the Commonwealth.

In my opinion, section 5 deals exclusively with the period subsequent to the completion of the work of repair. Apparently the purpose of the Legislature was, first, to

constitute the Metropolitan District Commission merely a public agency for the specific purpose of repairing the bridge during that period, imposing upon it no responsibility for the control and maintenance of the bridge until the repairs were finished, and secondly, to place the bridge under the care and control of the Commission from and after the time when the work was completed. At any rate, this seems to be the plain meaning of the statute. I must advise you, therefore, in answer to your first question, that the board of commissioners appointed under St. 1898, c. 467, is responsible for the policing, control and maintenance of the portions of the bridge kept open for public travel while the work of repair is proceeding, and that the cities of Boston and Cambridge, and not the Commonwealth, are liable under that statute for damages to persons traveling on the bridge, arising out of any defect or want of repair in such traveled portions. This constitutes a sufficient answer to your second, fourth and fifth questions.

As to your third question, it is my opinion that the Commission cannot grant a location to take effect prior to the completion of the work, but I see no objection to action on the petition before that time.

INSURANCE — FURNISHING OF BAIL BONDS BY SURETY COMPANY — SALE OF POWERS OF ATTORNEY-IN-FACT FOR THE EXECUTION OF BAIL BONDS.

A power of attorney-in-fact to execute a bail bond upon behalf of a surety company for the benefit of the holder of the power is not itself a contract of insurance or suretyship, but its exercise will result in the formation of a contract of suretyship. The seller of such a power must be a licensed resident agent of the surety company who issues it, under G. L., c. 175, § 157.

A bond executed by the holder of the power requires the seal of the surety company. The propriety of the acceptance of a bail bond so executed by the holder of the power, for his own benefit, is a subject for judicial determination.

You have directed my attention to a "power of attorney-in-fact for the execution of bail bonds," which you state is being sold in this State by a foreign insurance company.

To the Com-
missioner of
Insurance.
1924
August 4.

I assume from the tenor of your letter that the company is authorized to do the kinds of business referred to in G. L., c. 175, § 105, more particularly the business of acting as surety on bail bonds required in criminal proceedings, and I assume that the actual sales of these powers of attorney are made by individual persons not officers of the company.

The questions upon which you ask my opinion are as follows:—

1. Does a person who, for compensation, sells these powers of attorney on behalf of this surety company need to be licensed, either as an agent of the company, as provided in section 163 of G. L., c. 175, or as an insurance broker, as provided in section 166 of said chapter?

2. If a person named as attorney-in-fact in such power of attorney executes a bond in a criminal case by himself as principal and on behalf of the surety company as surety, and, as I am informed is the fact, the corporate seal of the company is not affixed thereto:— (a) Does the lack of the seal invalidate the bond? (b) Does failure to affix the seal constitute a criminal offence?

3. Does section 157 of said chapter apply to bonds executed by corporate surety companies as surety in favor of the Commonwealth or an obligee resident therein?

4. If the preceding question is answered in the affirmative, is a bond executed in this Commonwealth on behalf of the said company as surety, by a person resident in another State, pursuant to such a power of attorney, issued in violation of said section 157, such person not being a licensed resident agent of the company?

5. Does the fact that the person named in the power of attorney executes the bond as principal and as agent, on behalf of the surety company as surety, impair the obligation?

6. Is it discretionary, under section 105 of said chapter, for a magistrate authorized to take bail in a criminal case: (a) To decline to approve a bond executed by such a company; and (b) To decline to recognize such a power of attorney?

The document which you submit with your letter is a power of attorney the terms of which, in brief, authorize the holder (who, as you inform me, is a purchaser of the document) to act as an attorney-in-fact for the company, to execute and deliver, in its behalf as surety, any bail

bond not exceeding five thousand dollars, which may be required by any magistrate as bail or security for the purchaser's own personal appearance before a court, in the event of his having been arrested for any offence committed against the laws relative to the operation of motor vehicles of any of the States of the Union, including offences which may have resulted in injury to persons or damage to property, both as regards misdemeanors and felonies. A copy of a by-law of the company, which is printed on the back of the power of attorney and made a part thereof by reference, provides for the appointment of attorneys-in-fact with the power already referred to herein, namely, the power to execute bail bonds, inuring to their own benefit, on behalf of the company as surety, and provides that when so executed by the attorneys-in-fact such bonds shall be binding upon the company "as if signed by the president and sealed and attested by the secretary."

This document which you have submitted to me is not itself, when delivered, a contract of suretyship, but constitutes in effect a contract to enter into such a contract of suretyship upon the occurrence of certain designated circumstances and the exercise of the power of attorney by the purchaser of the document, who has by his purchase a power coupled with an interest. The sale of the document or power of attorney is the first step in a transaction which brings the company and its customer together into a contractual relationship which, upon the occurrence of a certain hazard, will result at the will of the purchaser in the formation of a contract of suretyship and the execution of a bail bond by the purchaser and the company for the benefit of the former. The sale of the document by some person who acts for the company has no other purpose, aside from the immediate receipt of money by the company from the purchaser, than the formation of the contract of suretyship concurrent with the making of the bond upon the happening of the designated event which is the hazard to be guarded against.

1. The document under consideration is not a contract of insurance. In relation to the making of bonds upon which this company becomes liable as a surety, under G. L., c. 175, § 107, it is, as a foreign company, subject to the other provisions of chapter 175 so far as such provisions are applicable, and agents and brokers are likewise subject to such provisions so far as applicable in connection with bonds upon which the company becomes surety. Of such provisions are those in sections 162 to 166 of chapter 175 which require licenses for agents and brokers who solicit business in, or act in the negotiation of, contracts such as are made by this company, including the negotiation of bonds on which the company is to act as surety.

Although the actual document under consideration which is sold by persons on behalf of the company is not, as has been pointed out, a contract of insurance or of suretyship nor a bond, nevertheless it may lead, and is intended to lead, directly, in the event of the happening of certain occurrences, to the making of a bond upon which the company will act as surety for the benefit of the purchaser. The company receives from the purchaser of the power of attorney a valuable consideration in money for giving him the right to make the company a surety on a bail bond which he may elect to execute for his own benefit upon the happening of a certain contingency. The sale of the power of attorney and the subsequent making of the bond are in effect both parts of a single transaction — the negotiating and making of a bond by the company as surety. The person who actually sells the document or power of attorney is the one who brings the purchaser to the company and the one who brings him to the formation of a contract of suretyship with the company upon the happening of certain contemplated conditions outside the sphere of control of the one who sells the power. The negotiations which lead to the sale of the power of attorney are presumably made upon the suggestion and solicitation of the person who is the actual seller of the document. He is the one

who comes in contact with the purchaser and produces for the benefit of the company an actual buyer of its power of attorney, for whom the company may eventually, and as the result of the sale of the power, make a bond. Bringing the parties together with a view to their making a contract is of the essence of the service performed by an agent or broker. See I Op. Atty. Gen. 74; *Pratt v. Burdon*, 168 Mass. 596.

The act of the person who sells the document is always, in anticipation of the parties and sometimes in reality, the act of one who is a cause of the company's making a bond. If such bond is made it is, from the viewpoint of one who deals in the company's documents, made by means of the act of the seller of the power of attorney. Even if the bond is not subsequently made, through failure of the purchaser to exercise his power, yet the person who sold the power of attorney has brought the company and the purchaser together in a contract which obligates the company, under certain conditions, to make a bond. Such a seller should, in my opinion, be held to come within the terms of G. L., c. 175, § 157, and should therefore be a licensed resident agent of the company.

I accordingly answer your first question to the effect that "a person who, for compensation, sells these powers of attorney" should be licensed as an agent of the company, under the provisions of G. L., c. 175, § 163, and should be a resident of the Commonwealth. I am of the opinion that section 166 of said chapter, concerning brokers, is not applicable under the terms of section 107 to a person who himself sells these powers of attorney for the benefit of the company, which powers, as I have said, form a part of a transaction calculated to result in the making of a bond by the insurance company.

2. G. L., c. 155, § 6, provides that a corporation may have a corporate seal, which it may alter at pleasure. G. L., c. 175, § 105, in relation to the execution of bail bonds by a company of the character of the one issuing the power

of attorney under consideration, requires that the bond executed by the company shall be "sealed with its corporate seal." G. L., c. 4, § 7, cl. 29th, provides: —

If the seal of a court . . . or corporation is required by law to be affixed to a paper, the word "seal" shall mean either an impression of the official seal upon the paper or an impression on a wafer or wax affixed thereto.

"Official seal," as used in the foregoing section, as applied to a corporation, means a corporate seal adopted by a corporation. The manner of adopting or altering a corporate seal by a foreign insurance corporation, such as the one issuing this power of attorney, is governed by the law of the place of incorporation, but it is evident from the by-law of this corporation, made a part of the power of attorney by reference and printed on the back thereof, that this corporation has a corporate seal and that the effect of the by-law is not to alter the seal but at most to waive the requirement of the fixation of such seal to bail bonds executed by its attorneys-in-fact, and to adopt in place thereof any seal placed upon the bond by its attorneys-in-fact as and for the seal of the corporation. In the absence of the statutory provisions above noted, it might be that the affixing of any seal to the bond by the attorney-in-fact on behalf of the corporation would be a sufficient sealing of the bond. The terms of our statutes, however, cannot be controlled by the by-law of the company, and these statutes require the affixing to the bond of the corporate seal of the company, either in the form of an impression of the seal upon the paper or in the form of an affixation to the document of a wafer or wax bearing an impression of the company's seal.

I answer your second question, in relation to division (a), in the affirmative. It is to be noted, however, that if such a bond had an ordinary seal affixed to it by the attorney-in-fact, though not a corporate seal, and was actually approved by a court, justice or other magistrate, despite

the fact that the instrument was not sealed in accordance with the statutory requirements, such approval, under the provisions of G. L., c. 175, § 105, would prevent the defeat of the bond, and the bond would be enforceable against the company acting as surety.

As to division (b) of the second question, upon the facts which you have set forth my answer is in the negative.

3. I answer your third question in the affirmative.

4. The authority given by the power of attorney under consideration to the purchaser is a limited power, not a general power, to transact business or to negotiate contracts or to issue bonds to the public on behalf of the company. The authority of the attorney-in-fact is limited, by the terms of the document sold to him, to the single act of executing bail bonds of a specified maximum amount, relative to certain enumerated offences under particular circumstances, for his own immediate benefit. It is true that an actual contract arises upon the execution of the bond, assuming that the same be properly executed and properly sealed, by an act done by the attorney-in-fact under authority given him by the company, but inasmuch as his authority is limited, as set forth, although he is an agent of the company for a certain definite cause of action, I am of the opinion that he is not such an agent or broker in respect to the bail bond or other matters as is intended to be subject to the provisions of G. L., c. 175, §§ 107 and 157. I am of the opinion that the sale of the power of attorney is an act so essentially a part of the entire contemplated transaction between the company and the purchaser that it, rather than the execution of the power, is to be regarded as the negotiation of the ultimate contract of suretyship and making of the bond. It is then immaterial whether or not the attorney-in-fact be a resident of this State, but it is required, under the provisions of chapter 175, last above mentioned, that the person who actually sells the power of attorney shall be a resident of this State, and, as I have said in an earlier portion of this opinion, a licensed

agent of the foreign insurance company issuing the power of attorney.

5. I answer your fifth question in the negative.

6. In relation to your sixth question: The acceptance and approval of a bail bond by a person empowered to take bail in criminal cases is a judicial act. In the exercises of a sound judicial discretion such person has the power to inquire into the authority of whoever executes a bail bond on behalf of another, to pass upon the legality of the form in which the instrument is executed, and to withhold acceptance and approval of such bond for proper cause. Whether or not the contracts involved in the negotiation of the power of attorney and the exercise of the power in relation to bail bonds in criminal cases thereunder are invalid, as against public policy, is a matter of some doubt, and the subject is a proper one for judicial decision. In the absence of a specific case requiring the interposition of the Attorney-General, an opinion from him upon this point, in anticipation of judicial determination, cannot at this time be given with propriety.

INSURANCE — FOREIGN LIFE INSURANCE COMPANY —
PARTICIPATION IN SURPLUS — ANNUAL DIVIDENDS
— ADDITIONAL OPTION — ACCELERATIVE ENDOW-
MENT PLAN — COMMISSIONER OF INSURANCE.

A participating policy of a foreign life insurance company containing the four options for distributing annual dividends, as provided for in G. L., c. 175, § 140, may also contain a fifth option, called the accelerative endowment plan. The enumeration of four options in G. L., c. 175, § 140, does not, as matter of law, exclude the insertion of additional options in a life endowment or annuity policy relative to the application of the annual dividend.

It is for the Commissioner of Insurance to determine whether the provisions relative to annual participation in the surplus of the company are "more favorable to the insured or his beneficiary" than those defined by the statute.

You inform me that there is pending in your department the matter of the approval or disapproval of forms of accelerative endowment policies issued by the Mutual

Benefit Life Insurance Company of Newark, New Jersey. I therefore give consideration to the question as to whether or not that company is writing insurance contrary to the provisions of G. L., c. 175, § 140.

G. L., c. 175, § 132, provides, in part, as follows: —

No policy of life or endowment insurance and no annuity or pure endowment policy shall be issued or delivered in the commonwealth until a copy of the form thereof has been on file for thirty days with the commissioner, unless before the expiration of said thirty days he shall have approved the form of the policy in writing, nor if the commissioner notifies the company in writing, within said thirty days, that in his opinion the form of the policy does not comply with the laws of the commonwealth, specifying his reasons therefor, provided that such action of the commissioner shall be subject to review by the supreme judicial court; nor shall such policy, except policies of industrial insurance, on which the premiums are payable monthly or oftener, and except annuity or pure endowment policies, whether or not they embody an agreement to refund to the estate of the holder upon his death or to a specified payee any sum not exceeding the premiums paid thereon, be so issued or delivered unless it contains in substance the following:

5. A provision that the policy shall participate in the surplus of the company annually, beginning not later than the end of the third policy year.

A policy shall be deemed to contain any such provision in substance when in the opinion of the commissioner the provision is stated in terms more favorable to the insured or his beneficiary than are herein set forth.

G. L., c. 175, § 140, provides, in part, as follows: —

. . . A foreign life company which does not provide in every participating policy hereafter issued or delivered in the commonwealth that the proportion of the surplus accruing upon said policy shall be ascertained and distributed annually and not otherwise, either by payment in cash of the amount apportioned to a policy, or by its application to the payment of premiums or to the purchase of paid up additions, or for the accumulation of the amounts from time to time apportioned, said accumulations to be subject to withdrawal by the policy holder, shall not be permitted to do new business within the commonwealth.

The policy of the Mutual Benefit Life Insurance Company contains the following provision as to annual dividends: —

Upon payment of the second year's Premium and at the end of the second and each subsequent Policy year, while this Policy is in force, and at the end of each complete year of Extended Insurance, this Policy or such Extended Insurance will be credited with such Dividends, including the portion of the divisible surplus accruing thereon, as may be apportioned by the Directors. Dividends thus credited, except in the case of Extended Insurance, may be applied in reduction of Premiums, or upon the Addition, Accumulation, or Accelerative Endowment plan. These options will be available each year, except that Dividends cannot be applied upon any one of said three plans while there is outstanding any credit arising from the application of Dividends upon either of the other two plans. If no other option be selected, Dividends will be paid in cash. The stipulated payments under Settlement Option A or B, or the Instalments certainly payable under Settlement Option C, will be increased by such Annual Dividends as may be apportioned by the Directors, beginning one year after the maturity of the Policy, but such Dividends will be payable only in cash.

Under the Accelerative Endowment plan Dividends are applied at Net Single Premium Rates to the conversion of the Policy into a specified Endowment, the term of which will be gradually shortened. Upon evidence of insurability satisfactory to the Company this Policy may be restored to the original plan and the Reserve thus released withdrawn in cash, provided the security of any outstanding loan shall not be impaired.

Inspection of the policy discloses that it contains the four options defined in section 140, together with what purports to be a fifth option, which is called by the company the accelerative endowment plan.

This plan is, that instead of using dividends in reduction of the annual premiums the insured may, at his discretion, pay his premiums in full in cash, the annual dividends being applied to convert the policy into an endowment policy and to shorten the endowment term without increasing the annual premiums. The company then agrees to pay the sum insured when the policyholder shall have attained a certain age, or at his previous death instead of at

death only. As each dividend is ascertained and applied the company issues a definite agreement to pay the policy at a specified date.

The accelerative endowment agreement reads as follows:—

The current dividend having been applied on the Accelerative Endowment plan, it is hereby agreed that:

If this policy be continued in force for its present amount until the Paid-up Option date shown on the face of this receipt and be then surrendered duly receipted, the Company will issue in exchange a Paid-up Participating Policy for the amount of this Policy and will also pay in cash the amount then payable. The Paid-up Policy will be subject to any outstanding indebtedness to the Company on this Policy and will be payable only at death.

Or, if the above option be not exercised and this Policy be continued in force for its present amount until the Maturity date shown on the face of this receipt and the Insured be then living and if the Policy be then surrendered duly receipted the Company will pay the amount stated as then payable less any outstanding indebtedness to the Company on this Policy.

The precise question is whether the addition of this so-called accelerative endowment option to the four options defined in section 140 is in violation of that section.

1. Pursuant to Resolves of 1906, c. 11, the Governor appointed a commission to recodify the insurance laws of this Commonwealth. As this commission was appointed shortly after the so-called Armstrong investigation of life insurance companies in the State of New York, it may be inferred that one reason for the passage of the aforesaid resolve was the evils disclosed by that investigation. One of these evils, which was the subject of investigation in New York, Massachusetts and Illinois, was a plan by which policy-holders were induced to defer payment of dividends upon their several policies for a series of years in exchange for the promise of the company to divide such portion of the resulting fund as might be determined by the company to be applicable among the "persistent survivors" alive at the end of the deferred period. The Massachusetts commission, in its report made in June,

1906, outlined at length the evils of this deferred dividend, or tontine, plan, which was in essence a gamble rather than a plan of insurance.

By St. 1907, c. 576, the Legislature enacted a law entitled "An Act to recodify, revise and amend the laws relative to insurance, other than fraternal and assessment." It may be inferred that the Legislature availed itself of the information contained in the report of the committee appointed under Resolves 1906, c. 11. G. L., c. 175, § 132, is a re-enactment of St. 1907, c. 576, § 75, and amendments thereof, while G. L., c. 175, § 140, is a re-enactment of St. 1907, c. 576, § 76, and amendments thereof.

It may be urged with considerable force that when the Legislature, by St. 1907, c. 576, § 76 (now G. L., c. 175, § 140), enumerated four methods by which the annual dividend may be annually applied, it excluded all other modes by implication. It is a familiar rule of statutory construction that an express provision excludes that which is not expressed or reasonably implied from that which is expressed. But all rules of statutory construction are simply guides designed to aid in ascertaining the legislative intent, which are not to be blindly applied or pressed to a dryly logical conclusion. No rule of construction can prevail against that intent if it can be ascertained. For the reasons hereafter set forth, I have reached the conclusion that the above rule of construction is inapplicable.

St. 1907, c. 576, § 75, now G. L., c. 175, § 132, enumerates ten provisions which must be included "in substance" in life, annuity and endowment policies. Clause 5 of that section provides:—

A provision that the policy shall participate in the surplus of the company annually, beginning not later than the end of the third policy year.

It seems plain that St. 1907, c. 576, § 76, now G. L., c. 175, § 140, is intended to state in greater detail the obligation imposed by said clause 5. It is significant, however, that

clause 5 simply requires that "the policy shall participate in the surplus of the company annually." The quoted clause of section 140 requires that the policy must provide that "the proportion of the surplus accruing upon said policy shall be ascertained and distributed annually and not otherwise, . . ." As a matter of grammar the words "and not otherwise" modify the word "annually" rather than the modes of distribution thereafter enumerated. If the Legislature intended that the enumeration should exclude all other methods not enumerated, it would have been easy to have so provided by express words. Under these circumstances, the fact that the words "and not otherwise" are so restrained as to modify the word "annually" acquires significance, especially when section 140 is read with section 132, clause 5.

In *Aetna Life Ins. Co. v. Hardison*, 199 Mass. 181, the insurance company brought a petition under St. 1907, c. 576, § 75, to review the action of the then insurance commissioner in rejecting certain proposed policies of insurance upon the ground that they did not comply with the requirements of that section, which is now G. L., c. 175, § 132. In the course of that opinion the court said, by Knowlton, C.J., at page 187: —

Another question is whether the provisions which, in substance, must be inserted in the policy, must appear in a form substantially identical with that given in the statute, or whether it is enough if they contain everything, in meaning and legal effect, that the statute prescribes, and at the same time include other things relating to the same subject, no one of which impairs the force of that which is prescribed for the benefit of the insured. Inasmuch as the ten provisions referred to and the other prescribed parts of the policy were intended for the protection of the policy holder, we are of opinion that, if they are contained in substance in the policy, their form may be varied, and additional provisions beneficial to the insured may be inserted, provided the requirements of the statute are satisfied, and are left undiminished by that which is added.

In *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, which was a similar petition, the court said, by Knowlton, C.J., at page 194: —

No departure from the exact provisions required by the statute should be permitted, unless it is too plain for doubt that the substitution is in every way as advantageous to the insured and as desirable as the prescribed provision.

Reading these cases together, it seems plain that sections 132 and 140 do not prescribe a standard form for life, annuity and endowment policies, even to the extent which was provided in the case of fire policies by section 99. On the contrary, they prescribe a minimum standard below which life, annuity and endowment policies must not fall, no matter in what words such policies may be expressed. This view is confirmed by the following clause, which was added to section 132 at the time of the revision: —

A policy shall be deemed to contain any such provision in substance when in the opinion of the commissioner the provision is stated in terms more favorable to the insured or his beneficiary than are herein set forth.

I am therefore constrained to the opinion that the quoted enumeration in G. L., c. 175, § 140, does not, as matter of law, exclude the insertion of additional options in a life, endowment or annuity policy relative to the application of the annual dividend.

2. Assuming that additional options relative to the application of the annual dividend may be inserted in a life, annuity or endowment policy, the next question is as to how the validity of such additional options shall be determined. G. L., c. 175, § 132, requires that such policies shall be submitted to the Commissioner in order that he may determine whether in his opinion they comply with the law, but subject to review by the Supreme Judicial Court. *Aetna Life Ins. Co. v. Hardison*, *supra*; *New York Life Ins. Co. v. Hardison*, *supra*; *Metropolitan Life Ins. Co. v. Insurance Commissioner*, 208 Mass. 386; *Metropolitan Life Ins. Co. v. Insurance Commissioner*, 220 Mass. 52; see also *Curtis v. New York Life Ins. Co.*, 217 Mass. 47. While the authority so exercised by the Commissioner is administrative

rather than judicial, the determination of the questions involved, both of law and fact, devolves upon him in the first instance. *New York Life Ins. Co. v. Hardison, supra.* That procedure should be followed in the instant case. The precise issue to be determined is whether the provisions of the instant policy, relative to annual participation in the surplus of the company, are "more favorable to the insured or his beneficiary" than those defined by the statute.

3. I understand that the policies issued in the past by the company have been submitted to and approved by your department. Even if, upon reconsideration of the same question upon a policy newly submitted under section 132, you should reach the conclusion that certain policies had been erroneously approved in the past, the issue of such policies, in the past, in reliance upon such approval, ought not, in my opinion, to exclude the company from doing "new business" within the meaning of section 140. If, however, the company should persist in issuing in the future a policy in a form disapproved by you, upon the ground that it did not comply with section 140, and such disapproval should be sustained upon review by the Supreme Judicial Court, the company should then be excluded from doing "new business" within the Commonwealth.

INSURANCE — BROKER — ADVANCE PAYMENT OF PREMIUMS FOR CUSTOMERS.

The extension of credit to customers by a broker for the amount of premium payments advanced by him is not a violation of G. L., c. 175, §§ 182-184.

You have asked my opinion as to the legality of a certain course of action which an insurance broker proposes to take in connection with placing or negotiating policies of insurance. I understand that the broker proposes to follow the course of action noted in your letter with all his customers, both those with whom he has been accustomed to deal and those with whom he may do business in the future,

To the Com-
missioner of
Insurance.
1924
August 5.

and intends to make it known among persons interested in obtaining policies of insurance that those who desire to place orders for insurance policies with him may avail themselves of the benefits of his proposed mode of transacting business. You state in your letter: —

A certain broker proposes to agree with his clients to advance their premiums to the company issuing their policies, which he negotiates, and the clients agree to reimburse the broker for such advances in monthly instalments with an interest charge.

I respectfully request your opinion on the following questions:

1. On the facts premised, is there, as a matter of law, any violation of G. L., c. 175, §§ 182–184?

2. Does such agreement, as a matter of law, amount to allowing “a valuable consideration or inducement not specified in the policy,” within the meaning of said sections, (a) if interest is charged and collected on the deferred payments, and (b) if interest is not so charged and collected?

G. L., c. 175, §§ 182–184, are as follows: —

SECTION 182. No company, no officer or agent thereof and no insurance broker shall pay or allow, or offer to pay or allow, in connection with placing or negotiating any policy of insurance or any annuity or pure endowment contract or the continuance or renewal thereof, any valuable consideration or inducement not specified in the policy or contract, or any special favor or advantage in the dividends or other benefits to accrue thereon; or shall give, sell or purchase, or offer to give, sell or purchase, anything of value whatsoever not specified in the policy; or shall give, sell, negotiate, deliver, issue, or authorize to issue or offer to give, sell, negotiate, deliver, issue, or authorize to issue any policy of workmen's compensation insurance at a rate less than that approved by the commissioner. No such company, officer, agent or broker shall at any time pay or allow, or offer to pay or allow, any rebate of any premium paid or payable on any policy of insurance or any annuity or pure endowment contract.

SECTION 183. No person shall receive or accept from any company or officer or agent thereof, or any insurance broker, or any other person, any such rebate of premium paid or payable on the policy or contract, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement not specified in the policy or contract or any policy or workmen's compensation insurance at a rate less than that approved by the commissioner. No person

shall be excused from testifying, or from producing any books, papers, contracts, agreements or documents at the trial of any other person charged with violating any provision of this and the preceding section, on the ground that such testimony or evidence may tend to incriminate himself; but no person shall be prosecuted for any act concerning which he shall be compelled so to testify or produce evidence, documentary or otherwise, except for perjury committed in so testifying.

SECTION 184. The two preceding sections shall apply to all kinds of insurance, including contracts of corporate suretyship, except those specified in the second clause of section forty-seven, as to which they shall apply only to insurance against loss or damage to motor vehicles, their fittings and contents and against loss or damage caused by teams, automobiles or other vehicles, excepting rolling stock of railways, as provided in said second clause. The said sections shall not prohibit any company from paying a commission to another company or to any person who is duly licensed as an insurance agent of such company or as an insurance broker and who holds himself out and carries on business in good faith as such, or prohibit any such person or any company from receiving a commission in respect to any policy under which he or it is insured, or in respect to any annuity or pure endowment contract held by him; nor shall said sections apply to (1) a distribution, without special favor or advantage, by mutual companies to policy holders of savings, earnings or surplus without specification thereof in the policy, or (2) the furnishing to the insured of information or advice by any company, officer, agent or broker with regard to any risk for the purpose of reducing the liability of loss, or (3) the payment or allowance to the insured of a return premium or a cash surrender or other value upon cancellation, lapse or surrender of a policy.

These sections are penal in their nature, and render both the broker and the insured who violate their provisions liable to the punishment provided for in section 194, but under the terms of section 193 the contract of insurance is not made invalid by the violation of these sections by the broker and the insured.

The primary purpose of sections 182 to 184, is as stated in opinions of former Attorneys-General, to prevent discriminations between individuals of the same class who may be applicants for insurance (IV Op. Atty. Gen. 503; V Op. Atty. Gen. 543), and to eliminate the evils of the practice of rebating, which is in itself a form of such dis-

crimination. The performance of certain specific acts is also forbidden by the statute, and among its terms is a prohibition against paying or allowing, or offering to pay or allow, "any valuable consideration or inducement" not specified in the policy in connection with placing or negotiating any policy of insurance. In the earlier forms in which this enactment appeared brokers were not included in the list of those falling within the terms of the prohibitions of section 182, but they were added to the list by St. 1908, c. 511, and have been retained therein ever since.

The essential problem presented by the terms of your communication calls for a determination as to whether or not the extension of credit to customers by a broker who advances money to pay premiums is a "valuable consideration or inducement" within the meaning of the statute, when the policy contains no provision relative to extension of credit.

To allow credit to another in relation to the purchase of something desired might, in common parlance, be called a valuable consideration for the purchase of the desired thing. Escape from the necessity for immediate payment in cash is perhaps, in a popular sense, a desirable or valuable state. Forbearance to sue upon a debt due may even be a sufficient consideration for the formation of a contract; but the customer, upon the state of facts presented by your letter, is placed by the action of the broker in the position of a debtor, — he is bound to pay the sum advanced in a manner and at a time fixed by agreement. He is not discharged from the obligation to pay the premium on his policy. He may even, under certain arrangements, be bound to pay the amount with interest. The customer's fundamental financial position is in no way bettered by the extension of credit. He has not in reality received a consideration or inducement of value.

The broker's offer is open to all, the other policy-holders are not affected as the cash is paid into the treasury of the company, and other brokers may pursue the same

course with their customers; so that the evil of discrimination among individuals of the same class, at which the statute is primarily aimed, is not induced by the broker's proposed course of action.

It is a matter of common knowledge that the business of selling insurance, like other businesses of similar magnitude and complexity, is carried on under a system whereby credits are extended to customers by agents and brokers. Immediate or advance payment of money to be applied upon premiums or renewal charges is not customarily required by agents or brokers from their regular customers, but by a system of bookkeeping the customer's payments are taken care of as they fall due and bills for such amounts sent to them and their accounts debited with corresponding sums on the books of the agents or brokers. The relation of debtor and creditor is then established between the agents or brokers and the respective customers. An entirely different situation would exist under such circumstances, and would exist under the facts outlined in your letter, if the agent or broker were to pay the amount of the premium without charging it to the customer and without creating the relation of debtor and creditor. The pursuance of the latter course would clearly fall within the prohibition of the statute; the customer would then receive virtually a gift of the amount involved in the payment of the first premium, his financial position would experience a gain with no corresponding obligation, and he would receive "a valuable consideration or inducement" in connection with negotiating the policy.

The acceptance of an interest-bearing note by the agent of an insurance company, who in turn became responsible, either by payment or by a debit in mutual accounts, to the company for the amount of the premium, has been treated by courts in other States as if it involved no breach of prohibitions in statutes not dissimilar to those in our own. *Ellis v. Anderson*, 49 Pa. Sup. Ct. 245; *Northern Assurance Co. v. Meyer*, 194 Mich. 371. The giving of credit for a

premium on a temporary policy by agents has been treated by our Supreme Court as proper, and the fact that it was the general custom in regard to such policies to give credit was recognized by the court. *Baker v. Commercial Union Assurance Co.*, 162 Mass. 358. Unless the provisions of the sections of the statute under discussion forbid it, there is no impropriety in the broker paying the premium for the insured and making mutually agreeable arrangements with the latter for the repayment of the amount to him. *Wheeler v. Watertown Fire Ins. Co.*, 131 Mass. 1.

In view of the foregoing considerations, I am of the opinion that the payment or the promise of payment of a premium by the broker, upon the understanding that the amount thereof shall be repaid to him by the customer upon terms mutually agreed upon, is not, as a matter of law, "a valuable consideration or inducement" within the meaning of the sections of the statute under consideration.

I accordingly answer your first question and your second question, in both its parts, in the negative.

ELEVATORS — INSPECTION OF ELEVATORS IN PRIVATE RESIDENCES.

The provisions of G. L., c. 143, §§ 62-71, apply to the inspection, installation and operation of elevators in private residences.

To the Com-
missioner of
Public Safety.
1924
August 5.

You have asked my opinion regarding the application of certain sections of the General Laws to elevators in private residences. Your request is as follows: —

I would respectfully request your opinion as to whether the provisions of the law relative to the installation and operation of elevators, as contained in G. L., c. 143, §§ 62-71, apply to such installation and operation in private residences.

The first provision of our statutes regarding protection of the public relative to elevators is contained in St. 1877, c. 214, § 2, and is specifically limited to manufacturing

establishments. The statute is entitled "An Act relating to the inspection of factories and public buildings." This section is inserted in substance in P. S., c. 104, § 14, in a statute entitled "Of the inspection of buildings." By St. 1882, c. 208, P. S., c. 104, was amended in an act entitled "An Act relating to the inspection of buildings," by adding after the word "factory" the words "mercantile or public buildings," and by adding a clause relative to a safety device for elevators, so as to enlarge to that extent the terms of the earlier statutes. The building laws were codified in St. 1894, c. 481, and the provisions of P. S., c. 104, § 14, as enlarged by St. 1882, c. 208, were placed in sections 41 and 42, but there the extent of the provisions relating to the protection of the public in relation to elevators was still distinctly limited to elevators in factories and mercantile or public buildings. St. 1901, c. 439, enlarged the number of protective appliances required by law on elevators but, properly construed, did not increase the previously enumerated classes of elevators to which these provisions were applicable. St. 1894, c. 481, §§ 41 and 42, as enlarged, were embodied in R. L., c. 104, §§ 27 and 28, in a chapter entitled "Of the inspection of buildings." As therein set forth neither section contains in words the specific limitation to "factory, mercantile or public building," but there is nothing in the language used in these provisions which, read in the light of the history of the legislation on the subject, can be said to have enlarged the classes of buildings to the elevators of which they were applicable. See *Rippucci v. Commonwealth Construction Co.*, 190 Mass. 518.

In 1913 the Legislature passed an act, chapter 806, entitled "An Act relative to the installation, alteration and inspection of elevators and to the appointment of a board of elevator regulations." This act provides a mode for the supervision of the construction of elevators, with authority for such supervision in various officials designated with relation to the geographical location of such elevators,

and by its phraseology, repeatedly used, appears to be applicable to "all" elevators, irrespective of the character of the buildings in which they may be respectively placed. It provides for the appointment of a board of elevator regulations, with power to frame regulations of a wide variety relative to "all elevators," and provides penalties for breach of such regulations. The sections of the Revised Laws previously referred to as embodying substantially the terms and the implied limitations are specifically repealed, together with other sections relative to the operation of elevators, contained in various statutes. The act of 1913 is now contained, virtually in its entirety, in G. L., c. 143, §§ 62-71. Said chapter 143 is entitled "Inspection and regulation of, and licenses for, buildings, elevators and cinematographs."

I am of the opinion that St. 1913, c. 806, was applicable to all elevators, and that its provisions show that it was the intention of the Legislature to enlarge the classes of elevators subject to regulation beyond the classes in specified kinds of buildings, to which the restrictions had been limited by previous statutes; and that the provisions of St. 1913, c. 806, as now embodied in G. L., c. 143, §§ 62-71, apply to elevators in private residences as well as to those of other kinds of buildings. An elevator, as a matter of common knowledge, is a machine of such a character that unless properly constructed, installed and maintained it may be a source of great danger to persons using it, and it is of such a character as to make regulations looking to its safety in private residences within the power of the Legislature to enact.

EDUCATION — PECUNIARY INTEREST IN SCHOOL BOOKS — PRINCIPAL OF STATE NORMAL SCHOOL.

G. L., c. 15, § 5, providing that certain "agents, clerks and other assistants" appointed by the Commissioner of Education shall have no pecuniary interest in any school book used in public schools, does not apply to a principal of a State normal school.

You request my opinion as to whether the provision contained in G. L., c. 15, § 5, in regard to certain appointees of the board having a pecuniary interest in the publication or sale of textbooks, applies to a principal of a State normal school.

To the Com-
missioner of
Education.
1924
August 5.

That part of G. L., c. 15, § 5, to which you refer reads as follows: —

. . . Except in the case of the teachers' retirement board, the division of public libraries, the division of the blind and institutions under the department, the commissioner may appoint such agents, clerks and other assistants as the work of the department may require, may assign them to divisions, transfer and remove them and fix their compensation, but none of such employees shall have any direct or indirect pecuniary interest in the publication or sale of any textbook or school book, or article of school supply used in the public schools of the commonwealth. . . .

The provision contained in this section in regard to pecuniary interest in textbooks applies solely to appointees under that section. The provision originated in St. 1896, c. 429, and applied to "agents," such as might be appointed by the board "to visit the several cities and towns," within P. S. c. 41, § 9. See R. L., c. 39, § 9. The provision as it appears in G. L., c. 15, § 5, applies to such "agents, clerks and other assistants" as may be appointed by the board under said section 5. The principal of a State normal school is not properly described by the words above quoted, nor is he appointed under said section 5, but rather under G. L., c. 73.

I am therefore of the opinion that the provisions of G. L., c. 15, § 5, to which you refer, do not apply to a principal of a State normal school.

TAXATION — INCOME TAX — GAIN RECEIVED BY AP-
POINTEE UNDER GENERAL POWER.

No estate is vested in the person appointed by the donee of a general power until the appointment is made.

A gain from the sale of securities received by trustees to whom property was appointed under a general power must be determined on the basis of its value at the time the property passed to them.

To the Com-
missioner of
Corporations
and Taxation.
1924
August 5.

You ask my opinion as to the proper interpretation of G. L., c. 62, § 5 (c), in its application to certain facts stated by you as follows: —

Under the will of A, who died in 1889, a resident of Boston, the residue of his property is divided into shares, one of which shares was left to trustees to hold and pay the income therefrom to B for life and upon B's death to pay over the principal of the trust to such persons as B should appoint by his will. B died in June, 1921, a resident of Massachusetts, and by his will appointed the property to the trustees to hold for the benefit of two persons, C and D, one of whom was a resident of Massachusetts and the other a non-resident of Massachusetts.

During the year 1923 the trustees sold certain securities constituting a part of the principal of the trust, and the question is, upon what "cost" the gain or loss from the sale is to be determined.

G. L., c. 62, § 5, cl. (c), as amended by St. 1921, c. 376, and by St. 1922, c. 449, and § 7, in part, are as follows: —

SECTION 5. Income of the following classes received by any inhabitant of the commonwealth during the preceding calendar year shall be taxed as follows:

(c) The excess of the gains over the losses received by the taxpayer from purchases or sales of intangible personal property, whether or not said taxpayer is engaged in the business of dealing in such property, shall be taxed at the rate of three per cent per annum. Any trustee or other fiduciary may charge any taxes paid under this paragraph against principal in any accounting which he makes as such trustee. If, in any exchange of shares upon the reorganization of one or more corporations or of one or more partnerships, associations or trusts, the beneficial interest in which is represented by transferable shares, the new shares received in exchange for the shares surrendered represent the same interest in the

same assets, no gain or loss shall be deemed to accrue from the transaction until a sale or further exchange of such new shares is made.

SECTION 7. . . . In determining gains or losses realized from sale of capital assets, the basis of determination, in case of property owned on January first, nineteen hundred and sixteen, shall be the value on that date, and in case of property acquired thereafter, the value on the date when it is acquired.

In *Bingham v. Commissioner of Corporations and Taxation*, 249 Mass. 79, the complainants, as executors, had sold securities in the estate at a price greater than their cost to the testator but less than their value at the time of his death, and a tax had been levied on the gain over the cost to the testator, which the court held was invalid and should be abated. That case is essentially different from the case which you state. The court there held that the passing of the testator's property to the executors was a new acquisition by them, and that therefore any increase in value prior to that time was not a gain realized by them when the securities were sold. The case you put raises the different question whether gains received from purchases and sales of intangible personal property by an appointee under a general power are to be measured by the difference between the sale price and the value at the time the power was granted, or by the difference between the sale price and the value at the time the power was exercised.

But while the decision in *Bingham v. Commissioner of Corporations and Taxation* is not an authority which is decisive of the question under discussion, the opinion contains an expression of views as to the nature of income which throws considerable light on that question. Concerning the meaning of the word "income," as used in the income tax law, Chief Justice Rugg says as follows: —

The word "income" as used in these sections may be said to include the true increase in amount of wealth which comes to a person during a stated period of time. It imports an actual gain. It is based on the practical conception that additional property has come to the taxpayer

out of which some contribution is exacted and can be paid for the support of government. Income indicates increase of wealth in hand out of which money may be taken to satisfy the enforced pecuniary contributions levied to help bear the public expenses. It does not comprehend increase in the value of capital investment discernible only by estimation and not otherwise. It refers simply to an increase in value realized by sales or conversion of capital assets.

It is a general principle that appointed property passes to the appointee under a power of appointment not from the donee of the power but from the donor. As the court said in *Walker v. Treasurer and Receiver General*, 221 Mass. 600, 602: —

The power is a deputation of the donee to act for the donor in disposing of the donor's property. Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power.

So it was held that under the succession tax law the decedent whose estate was liable to taxation was the donor of a power of appointment rather than the donee. *Emmons v. Shaw*, 171, Mass. 410. See, also, *Walker v. Treasurer and Receiver General*, 221 Mass. 600; *Hill v. Treasurer and Receiver General*, 229 Mass. 474; *Minot v. Paine*, 230 Mass. 514. But after the passage of St. 1909, c. 527, § 8 (G. L., c. 65, § 2), providing for the taxation under the succession tax law of property passing by the exercise of a power of appointment, in certain cases, as property belonging to the donee of the power and disposed of by him, it was held in *Minot v. Treasurer and Receiver General*, 207 Mass. 588, that such a provision was within the constitutional power of the Legislature. In the opinion in that case the court said on the subject, pages 590 to 592, as follows: —

It generally has been held that a title derived through a power of appointment in a will or deed is to be taken as coming from the donor of the power, rather than from the donee. But in many particulars the donee is often more directly responsible for the possession and enjoyment of the beneficiary than the donor.

.

The condition of property which is subject to a general power of appointment contained in a will or deed, and which, in default of appointment, is to be given over to persons named, is peculiar. The donee of the power has no title to it, but he has an absolute right to dispose of it by the exercise of the power. . . . After a will or deed containing such a power has taken effect and before the donee of the power has acted under it, have all rights of succession in possession and enjoyment so vested that there is no possibility of a succession that will come into existence later, when the final disposition of the property is determined by an exercise of the power or by a failure to exercise it? It is held, and so far as we know without dissent, that, through the exercise of the power, a right of succession to property may come into existence afterwards, which properly may be a subject for the imposition of a tax. . . . The tax is imposed as of the time when the succession in possession and enjoyment occurs through the happening of the event that determines it.

Clearly, no estate is vested in the person appointed by the donee of a general power until the appointment is made. Applying to this situation the words of Chief Justice Rugg quoted above, there can be no true increase in the amount of wealth which comes to an appointee under a general power, by a sale of the appointed property, from any increase in value of the property before his appointment. Prior to the time of his appointment the property has not passed to him in possession or enjoyment. Prior to that time there was nothing from which he could derive any actual gain.

The fact that in the case you state the trustees to whom the property was appointed happened to be the same persons who previously held it makes no difference. After the appointment they held it by a different title. It is my opinion that the trustees have derived no gain from any increase in value of the securities subsequently sold by them prior to the time of their appointment, and that any gain received by them must be determined on the basis of its value when it passed to them by virtue of the appointment.

CONSTITUTIONAL LAW — "ANTI-AID" AMENDMENT — RE-
IMBURSEMENT OF TOWNS FOR TEACHERS' SALARIES.

A school cannot be partly private and be the object of an expenditure of public funds.

The Punchard Free School in Andover is, on the facts, a public school.

A school may be in receipt of private aid without losing its public character.

Under G. L., c. 70, pt. I, a town may be reimbursed with respect of only those teachers' salaries which are in fact paid by the town.

To the Com-
missioner of
Education.
1924
August 6.

In connection with the duties of your department in carrying out the provisions of G. L., c. 70, pt. I, you have asked my opinion about the status of the Punchard Free School in Andover, and whether or not the Commonwealth may under that chapter allow reimbursement to the town of Andover on salaries paid to teachers in this school.

By will proved in 1850 Benjamin H. Punchard gave fifty thousand dollars to the town of Andover "for the purpose of founding a free school." The will provided for the expenditure of some of the fund in the purchase of buildings and for the maintenance of the school out of the income of the balance. There were detailed provisions for the selection of trustees, who were to manage the school. There were certain restrictions upon the way in which the school should be conducted. The trustees of the school were made a corporation by St. 1851, c. 7, with powers and duties appropriate for the administration of the trust created by the Punchard will. In 1868 the schoolhouse which was built by the trustees was destroyed by fire, and a statute of 1869, chapter 396, authorizing the town to appropriate funds to aid the trustees in erecting a new schoolhouse and to raise annually a further sum to aid in defraying the school expenses, gave rise to the decision in *Jenkins v. Andover*, 103 Mass. 94. The court held the statute unconstitutional, as violating what was then the eighteenth article of amendment of the Massachusetts Constitution. The court pointed out that the appropriation was clearly an appropriation intended for the support of public and common schools; that equally clearly the Punchard School,

being under the control of the trustees, was not a school "conducted according to law, under the order and superintendence of the authorities of the town." "It would be inconsistent with the terms of the will to give them any such control." *Ibid.*, p. 102. Between the time of *Jenkins v. Andover* and the present there has intervened a period of transition in which the power of control and the responsibility of maintenance have gradually shifted away from the trustees and toward the town. Whether or not the respective courses of the town and of the trustees during this period were valid is not now a necessary inquiry.

Your letter and those which you have presented to me, as embodying the present state of facts, disclose a situation wholly different from that of 1869. You state that today the town owns the grounds and the buildings and equipment, furnishes all the textbooks and supplies, pays the janitor's salary, pays the salary of nine teachers and of all special teachers connected with the school, and pays twelve-seventeenths of the salary of the principal; that it appropriates for the school nearly thirty-one thousand dollars a year; and that the trustees of the Punchard Fund now contribute some thirty-four hundred dollars a year, paying five-seventeenths of the principal's salary and the whole of the salary of one teacher. In one place you state that technically the trustees have the power to reject or retain this teacher, but that it has been the custom for many years to act upon the recommendation of the principal and the superintendent of schools. You state nothing indicating any present power of control by the trustees of the Punchard fund except this "technical power."

In the letter presented by your department as a résumé of the facts concerning control as they now pertain, it is said that "all supervision, organization, and administration of the school are entirely in the hands of the superintendent and principal"; and further, that if the trustees should "take any action not in accordance with the will of the school committee, all responsibilities of administration would

probably be assumed by the committee." Summarizing, you have described a condition of complete public ownership and public control.

1. You ask: "Under our present Constitution is it possible for a school to be part private and part public?" Without overlooking the fact that the standing of a public school, as such, is not impaired by the mere receipt of contributions to support from private quarters (see *Jenkins v. Andover*, *supra*, at page 99), or the fact that, conceivably, a public school can be operated in conjunction with a private school in such fashion as together to perform the practical function of a single educational unit (see *Dickey v. Trustees of Putnam Free School*, 197 Mass. 468; VI Op. Atty. Gen. 448), it is possible, nevertheless, to answer your question with a categorical negative so far as pertains to the administration of G. L., c. 70, pt. I. The relevant language of Mass. Const. Amend. XLVI is as follows: —

All moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding . . . any . . . school . . . which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both . . .

It is perfectly clear that a school cannot be partly under private management and at the same time participate in public character to a sufficient extent to be the object of the expenditure of public funds.

2. You ask whether the Punchard School can "be considered under the law a public high school." In respect of the meaning which these words have in connection with your third question it is my opinion that the town of Andover is maintaining in fact a public high school. On the facts

stated, the town is maintaining for the purpose of secondary education a complete plant and equipment and a substantial staff of teachers, all at the town's expense and under the town's control and management. If the relation of the trustees to the town be simply that of a contributor to the support of the school, whether by the furnishing of money which may be used in paying the salary of a teacher and part of the salary of the principal, or by the furnishing, as it were, of a prepaid teacher and prepaid five-seventeenths of a principal, the school, as maintained by the town, is none the less a public school, therefore. *Jenkins v. Andover, supra*, at p. 99. It is apparently not a fact that (*cf. Dickey v. Trustees of Putnam Free School, supra*) the trustees are maintaining a separate school with a teaching staff as above, which is, however, co-operating with the public school. The circumstance that the Department of Education, under G. L., c. 71, § 4, has exempted the town of Andover from maintaining a high school is not inconsistent with the fact that the town seems, nevertheless, to be in substance maintaining such an institution. Only the existence of some power of control in the trustees could challenge the validity of these conclusions.

3. You ask whether the Commonwealth, under G. L., c. 70, pt. I, can allow reimbursement to the town of Andover on salaries paid any teacher employed to teach in the Punchard School. The answer to this question is governed by the constitutional provision already quoted. So far as ownership of the school is thereby made a prerequisite to the allowing of such reimbursement, the condition is fulfilled upon the facts stated. The prerequisite of the fact of complete public control by the appropriate local officers seems also to be satisfied by the circumstances upon which this opinion is predicated. Upon the face of your letter there seems to remain no power of control in the trustees over what probably constitutes a complete educational unit. If so, the facts of this case are as strong as those upon which was based I Op. Atty. Gen. 427.

They are quite distinguishable, on the other hand, from the facts upon which was found II Op. Atty. Gen. 75, where the school in question was an incorporated academy under the ultimate direction of a supervising board of three persons, of whom only one was appointed by the school committee of the town, one by the trustees of the academy, who were wholly independent of the town's authority, and one by the two other members just mentioned. The reimbursement authorized by G. L., c. 70, pt. I, and acts in amendment thereof, may, therefore, be paid, so far as its terms permit, with respect of the nine teachers who are paid wholly by the town, and with respect of the principal also in so far as the salary paid him by the town corresponds to the provisions of G. L., c. 70, § 2, as amended by St. 1921, c. 420, § 1, relating to the minimum salaries against which reimbursement shall be allowed. No reimbursement is permissible on account of the teacher who is wholly paid by the trustees. This latter conclusion is reached without necessarily deciding the correct legal interpretation to be placed upon the arrangement by which this teacher is furnished, for the short reason that G. L., c. 70, pt. I, contemplates part reimbursement for only such salaries as are paid by the town.

STATE PRISON — CONCURRENT SENTENCES — AGGREGATE
OF THE MINIMUM TERMS.

The court, in imposing several sentences to the State Prison, may order that they be served concurrently.

The aggregate of the minimum terms of several concurrent sentences is the largest minimum term.

To the Com-
missioner of
Correction.
1924
August 14.

You request my opinion as to the effect of a provision in a sentence to the State Prison that it "run concurrently" with another sentence referred to.

"In the absence of a statute to the contrary, if it is not stated in either of two or more sentences imposed at the same time that the imprisonment under any one of them

shall take effect at the expiration of the others, the periods of time named will run concurrently and the punishments will be executed simultaneously." 16 C.J., p. 1374. See also *Kirkman v. McClaughry*, 152 Fed. 255; *Kite v. Commonwealth*, 11 Met. 581.

St. 1884, c. 265 (G. L., c. 279, § 8), provided that commitment may be made on two or more sentences at the same time, and that "such sentences shall be served in the order named in the mittimus."

St. 1897, c. 294, § 1 (last part of G. L., c. 279, § 24), provided that an additional sentence imposed under St. 1895, c. 504, providing for the imposition of maximum and minimum sentences (first part of G. L., c. 279, § 24), "shall take effect upon the expiration of the minimum term of the preceding sentence."

The purpose of these two acts (St. 1884, c. 265, and St. 1897, c. 294, § 1) was to change the common law that where there was no direction to the contrary sentences should run concurrently. These acts were not intended to restrict the power of the courts to impose a sentence to run concurrently with another sentence. The provision contained in St. 1897, c. 294, § 1 (last part of G. L., c. 279, § 24), has been repealed by St. 1924, c. 152, and St. 1924, c. 165, was enacted, to the effect that when a sentence is ordered to take effect "from and after the expiration" of a previous sentence such previous sentence shall be deemed to have expired when the prisoner is released therefrom by parole or otherwise. Even if it were thought that the statutes did restrict the power of the courts to order a sentence to run concurrently, yet if the court should insert such a provision in a sentence it is difficult to see how the sentence can be enforced as an unqualified one.

If the court imposes several sentences and orders that they be served concurrently, "the aggregate of the minimum terms of the several sentences," under G. L., c. 127, §§ 131 and 133, is the longest minimum term. Thus, if two sentences, one three to five years and another six to eight

years, were imposed to run concurrently, the aggregate of the minimum terms of the two sentences would be six years.

I am therefore of the opinion that the court, in imposing several sentences to State Prison, may, in its discretion, order that they be served concurrently and that the aggregate of the minimum terms of several concurrent sentences is the longest minimum term.

STATE POLICE — POWER UNDER VOLSTEAD ACT — POWER
CONFERRED ON STATE OFFICERS BY CONGRESS.

State police officers, as such, have no authority or power to act under the National Prohibition Act.

The police, however, as private citizens may exercise such powers in apprehending violators of the Federal law as are shared by them in common with all other citizens.

While Congress may confer power upon State officers which the latter may, in their discretion, exercise, unless prohibited by State legislation, Congress cannot compel them to act.

To the Com-
missioner of
Public Safety.
1924
August 14.

You request my opinion whether under section 26 of the Volstead Act, so called, members of the State Police are given authority to seize vehicles in which intoxicating liquors are being transported and to arrest the person in charge thereof.

The Act of October 28, 1919, c. 85, title II, § 26, called the "National Prohibition Act," provides, in part, as follows: —

When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. . . .

The act is a Federal statute, relates to a violation of Federal law and confers drastic power of seizure of private property and arrest of persons without warrant. State officers of the law, as such, have no power under the act unless section 26, by the use of the words "any officer of the law," confers such power upon them. It is not to be lightly presumed that Congress has conferred such extensive powers upon the innumerable thousands of officers of the law of all the States of the Union, over whose appointment it has no control and whose actions it cannot govern. In my opinion, the statute should not be construed as conferring these powers upon the officers of the independent sovereign States unless the context of the act clearly warrants such interpretation.

Section 2 of the act confers powers and imposes duties upon certain Federal officers, and authorizes the officers enumerated in U. S. Rev. Stat., § 1014, to issue search warrants. The officers there enumerated, among others, are certain magistrates "of any *State*." Section 22 of the act specifically confers power to bring action to enjoin a liquor nuisance, as defined in the act, upon the "prosecuting attorney of any *State or subdivision thereof*." It thus appears that when Congress intended to confer power under the act upon State officers it specifically referred to officers of a State.

Section 26, which refers to "any officer of the law," in the very next line refers to a "violation of the law." The latter, without question, refers exclusively to a violation of the *Federal* law. It would be a strain upon language to interpret the words "the law" as State or Federal law, when used in connection with the words "officer of the law," and in the next line of the section to interpret "the law" merely as Federal law.

Moreover, the section imposes a duty upon the officers of the law to seize and arrest. It is well established that while Congress may confer power upon State officers, which the latter *may* exercise or not in their discretion, unless

prohibited by State legislation, Congress cannot lawfully compel them to act. *Goulis v. Judge of District Court*, 246 Mass. 1; *United States v. Jones*, 109 U. S. 513, 519; *Robertson v. Baldwin*, 165 U. S. 275; *Dallemagne v. Moisan*, 197 U. S. 169. Even if the statute specifically empowered members of the State police to act, they could refrain from exercising the powers so granted if they so desired.

Section 28 of the act provides: —

The commissioner, his assistants, agents, and inspectors, and all other officers of the *United States*, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

This section grants protection only to officers of the United States. It is difficult to suppose that Congress, by section 26, conferred power upon State officers of the law and deliberately excluded them by section 28 from the protection afforded to officers of the United States. It, therefore, seems to me that Congress by the use of the words "any officer of the law," in section 26 of the act, conferred power only on Federal officers and did not authorize State officers to act thereunder. See to the same effect an opinion of the Attorney-General of Maryland to the Police Commissioner of Baltimore, dated August 5, 1920.

I am accordingly of the opinion that members of the State police, as such, have no authority or power to act under the National Prohibition Act. The police, however, are private citizens also, and, as such, may exercise such powers in apprehending violators of the Federal law as are shared by them in common with all other citizens.

METROPOLITAN POLICE — CIVIL SERVICE — PROMOTION.

The power temporarily to assign officers of the police force to duties of a higher rank is necessarily included in the power of the Metropolitan District Commission to organize its police force.

A temporary assignment of such officer to duties commonly pertaining to an office of a higher grade does not constitute a promotion, within the purview of the civil service laws.

You request my opinion as to whether the vote of the Commission that "until further orders Captain Spencer G. Hawkins be in charge and command of police matters in all divisions" constitutes a promotion within the meaning of G. L., c. 31. You state that the Commission has not made Captain Hawkins acting superintendent, has given him no additional salary and still designates him as captain.

Under St. 1922, c. 406, the Commission was specifically authorized to appoint, and did appoint, Herbert W. West as superintendent of police. Mr. West recently died, and the above vote was presumably passed to meet the emergency. The vote, by its very terms, assigns Captain Hawkins to certain duties only "until further orders." The case, therefore, is merely one where a captain of police has been temporarily assigned to other duties involving greater powers.

The power temporarily to assign officers of the police force to duties of a higher rank is necessarily included in the power of the Commission to organize its police force. G. L., c. 28. A temporary assignment of such officer to duties commonly pertaining to an office of a higher grade does not constitute a promotion within the purview of the civil service laws. On the assumption, therefore, that the assignment is merely temporary, I am of the opinion that the vote passed by the Commission does not constitute such promotion. I do not pass upon the question which would arise if a permanent assignment were to be made.

To the Metro-
politan District
Commission.
1924
August 27.

BACK BAY LANDS — EQUITABLE RESTRICTIONS.

The restrictions in deeds from the Commonwealth against use for "any mechanical or manufacturing purposes" do not forbid the use of premises for offices or stores.

To the Com-
missioner of
Public Works.
1924
August 27.

You have asked my opinion whether the use of a building to be erected at 7 and 9 Newbury Street, Boston, for offices and a store would violate the following restriction found in the original deed from the Commonwealth to the early predecessors in title of the present owner: —

This conveyance is made upon the following stipulations and agreement: That any building erected on the premises shall be at least three stories high for the main part thereof, and shall not, in any event, be used for a stable, or for any mechanical or manufacturing purposes.

Some of the history of the transactions by which the Commonwealth became the proprietor, and later the grantor to numerous grantees of parcels, of a large tract of land in what is commonly called the Back Bay, is found in *Wilson v. Massachusetts Institute of Technology*, 188 Mass. 565, 568 *et seq.*; see also *Allen v. Mass. Bonding & Insurance Co.*, 248 Mass. 378. It discloses a general and, at the time, well understood intent that this section of Boston should be given over in general to a residential district of a high standard. To that end the restriction in question, together with other restrictions, was inserted in the deeds of all the lots on the northerly side of Newbury Street from Arlington Street to Berkeley Street. The effect of this restriction is to be measured, however, by the language actually and deliberately used, under the usual rules of construction of deeds, including specifically the rule that "in case of doubt a clause creating an equitable restriction is to be construed against the grantor and in favor of the grantee's right not to have his land restricted." *American Unitarian Assn. v. Minot*, 185 Mass. 589, 595.

Had the Commonwealth seen fit to do so, it might have given only deeds which restricted the grantees to the

building of dwelling houses and the usual out-buildings, and to the use of the premises only for the purposes of private dwellings. Such restrictions are common and well known. Had it seen fit to do so, it might have given only deeds which confined the grantees to uses not "detrimental to the use of the surrounding locality for dwelling houses." See, for example, *Noyes v. Cushing*, 209 Mass. 123, 125. Numerous other types of restrictions might be mentioned, and it must be assumed that the Commonwealth, through its representatives, deliberately selected that variety which it deemed best suited to its purposes. It choose, in fact, to govern the type of buildings by imposing certain architectural limitations, and to govern the use of them by stating two categories of forbidden uses, — "mechanical or manufacturing." The language of *Noyes v. Cushing*, *supra*, at p. 125, seems apt and conclusive, —

. . . in the absence of anything . . . limiting the buildings to be erected to dwelling houses we do not see how the restrictions can be so construed.

See, also, *Carr v. Riley*, 198 Mass. 70. *Cf.*, further, the guarded language of the court in *Allen v. Mass. Bonding & Insurance Co.*, *supra*, at p. 383: —

It is plain that there was on the part of the Commonwealth a general scheme of real estate development of considerable magnitude as to the Back Bay district. It covered a large area. It was designed to create an attractive neighborhood given over *in general* to residential uses. . . .

In the ordinary understanding of language these two words, "mechanical" and "manufacturing," do not describe the activities of a store or of business offices. No Massachusetts decision has been found which, upon any context or state of affairs, has undertaken to stretch them to such a length. The use for offices or a store might well come within the designation of "mercantile," a term plainly understood by the court in *Carr v. Riley*, *supra*, at p. 75, to be of different scope from the words "manufacturing"

or "mechanical." But that term, although used in certain other deeds from the Commonwealth of Back Bay land, was omitted from the deeds of land upon the north side of Newbury Street. This fact is noted by the court in *Allen v. Mass. Bonding & Insurance Co.*, *supra*, at p. 381. The decision in *Bacon v. Sandberg*, 179 Mass. 396, is that the fact that some of the deeds there in question contained the words "trade or manufacture," while others contained the words "manufacturing or mechanical," did not preclude the various restrictions inuring to the benefit of the several grantees as part of a general scheme; it is not to be understood as a decision that the two groups of words were identical in scope.

I must therefore say to you that the use of the premises at 7 and 9 Newbury Street for offices or a store is not, upon the facts stated, forbidden by the quoted restriction. I am not, of course, purporting to pass upon whether every conceivable use to which the tenant of a store or of an office could put his premises would be valid. It is enough at the present time to say that the proposed general uses for offices or a store are not prohibited. The validity of particular uses would have to be considered when they actually arise.

REGISTRAR OF MOTOR VEHICLES — REVOCATION OF LICENSE
— NEW LICENSE — APPEAL TO DIVISION OF HIGHWAYS
— “CONVICTION.”

The power of the Registrar of Motor Vehicles to issue and revoke licenses to operate motor vehicles is statutory, and can be exercised only in accordance with the statute.

After the license of a person, convicted of operating a motor vehicle while under the influence of intoxicating liquor, has been revoked, the registrar has no power to issue a new license prior to the expiration of the time fixed by statute.

The power of the Division of Highways to entertain appeals from the registrar's decisions is confined to cases where the registrar may exercise his discretion.

No appeal lies from the refusal of the registrar to issue a new license after a revocation and prior to the expiration of the statutory period.

The placing of a case on file, upon the payment of costs, after a plea of “not guilty” does not constitute a “conviction.”

Such action constitutes an “acquittal” within the purview of G. L., c. 90, § 24.

You request my opinion upon the following questions: —

To the Com-
missioner of
Public Works.
1924
August 28.

1. Under the provisions of G. L., c. 90, § 24, when a person is convicted of operating a motor vehicle while under the influence of liquor, and the court record of such conviction is sent to the Registrar of Motor Vehicles without a recommendation, and the license is then revoked in accordance with the section, has the registrar the right to rescind action and restore the license at any time before the expiration of said license, if the court submits a recommendation after the revocation?

G. L., c. 90, § 24, contains the following provisions: —

. . . A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event and shall, unless the court or magistrate recommends otherwise, revoke immediately the license of the person so convicted, and no appeal from the judgment shall operate to stay the revocation of the license. . . . The registrar in his discretion may issue a new license to any person acquitted in the appellate court, or after an investigation or upon hearing may issue a new license to a person convicted in any court; provided, that no new license shall be issued by the registrar to any person convicted of operating a motor vehicle while under the influence of intoxicating liquor until one year after the date of final conviction, if for a first offence, or five years after any subsequent conviction. . . .

The power of the Registrar of Motor Vehicles to issue and revoke licenses to operate motor vehicles is purely

statutory, and can be exercised only in accordance with the statute. He cannot in any respect transcend the authority thus given. *Commonwealth v. Maletsky*, 203 Mass. 241; *Goldstein v. Conner*, 212 Mass. 57; *Kilgour v. Gratto*, 224 Mass. 78; *Wright v. Lyons*, 224 Mass. 167, 168; *Commonwealth v. McCarthy*, 225 Mass. 192, 195; *Commonwealth v. Atlas*, 244 Mass. 78; *Connors v. Lowell*, 246 Mass. 279. The statute specifically prescribes the conditions under which a new license may be issued after a revocation. Once revoked, a license may be issued only in the manner thus prescribed. I am accordingly of the opinion that your first question should be answered in the negative.

2. Your second question is as follows:—

If the court, in the case above mentioned, submitted a recommendation that the license be not revoked as provided for in the statute, and the registrar refused at the time to accept such recommendation and revoked the license, would the registrar have the right to rescind his action at a later date and accept the recommendation and then restore the license?

I assume that your question refers to the restoration of a license prior to the expiration of the time prescribed by the statute. It follows from what I have said in answer to your first question that the answer to your second question is "No."

3. Your third question reads:—

Should the registrar decline to issue a license to a person convicted of operating a motor vehicle while under the influence of liquor, under either of the situations covered by questions 1 and 2, can the Division of Highways, under section 28, upon an appeal by a person aggrieved by such ruling or decision of the registrar, order said ruling or decision to be affirmed, modified or annulled?

The power of the Division of Highways to entertain appeals from the rulings or decisions of the registrar is entirely statutory. It is plain that this power is confined to consideration, upon proper appeal, of rulings and decisions of the registrar only in cases where the registrar may exercise

his discretion. No appeal may be made in cases where the registrar has no discretion as to his action. Since the registrar has no discretion as to his action in the situations covered by the first and second questions, no appeal from his refusal to issue a new license in such cases will lie. The third question should, therefore, be answered in the negative.

4. Your fourth question is as follows: —

On May 31, 1921, A was convicted of operating a motor vehicle while under the influence of liquor and was fined \$100. On August 19th he was again convicted of operating a motor vehicle while under the influence of liquor and sentenced to six months in the house of correction, from which sentence he appealed. After numerous continuances, on April 29, 1924, he was tried in the Superior Court and the jury disagreed. On that same day the district attorney and the counsel for A agreed that the case should be placed on file upon the payment of \$100 as expenses. Under the statute, of course, the registrar has no power to restore the license until five years from the date of the final conviction. Was the latest action of placing on file, after a plea of not guilty and the payment of \$100 as expenses, a conviction, from which the five years should date, or was it an acquittal, which would enable the registrar to restore the license?

G. L., c. 90, § 24, contains the provision that, —

no new license shall be issued by the registrar to any person convicted of operating a motor vehicle while under the influence of intoxicating liquor until one year after the date of final conviction, if for a first offence, or five years after any subsequent conviction.

The effect of an entry that a case be “placed on file” is that it is indefinitely continued. *Commonwealth v. Maloney*, 145 Mass. 205, 210. Such disposition can be made only by order of the court. *Attorney General v. Tufts*, 239 Mass. 458, 537. Formerly it was perhaps the practice to make such order only after conviction by trial or on plea of guilty. *Marks v. Wentworth*, 199 Mass. 44, 45. In that event, the defendant remained liable for sentence at any time. *Marks v. Wentworth*, 199 Mass. 44, 45. Apparently it has become the practice, if justice seems to require it, to enter

such order without a verdict and although the plea is not guilty. *Attorney General v. Tufts*, 239 Mass. 458, 537. It appears that the plea of not guilty was not withdrawn in the case referred to in your question. Clearly, the accused has not been "convicted" in the Superior Court.

The question remains whether the accused has been "acquitted," within the meaning of that word as used in G. L., c. 90, § 24. If the word "acquitted" is construed technically, it may be urged that it is as clear that the accused in the case referred to has not been "acquitted" as it is that he has not been "convicted." The case has been indefinitely continued. I am of the opinion, however, that the word "acquitted," as used in the statute in question, should be given a broader and less technical meaning; and that the word "acquitted," as there used, was intended to cover the case supposed. Unless the disposition of the case supposed is an acquittal, the statute makes no provision whatever as to the operator's right to a license. The disposition of a case by placing it on file is in substance intended as a final disposition of the case. When made, as here, upon stipulation that the accused pay costs, it amounts in effect to an arrangement with the accused, approved by the court, that it shall be a final disposition. *Commonwealth v. Maloney*, 145 Mass. 205, 210. It was common practice at the time when the provisions of G. L., c. 90, § 24, were first enacted (1916) to make what is in substance final disposition of cases in this way. This same section enacts in its later provisions that, except as therein provided, no prosecution for a second offence shall be "placed on file or otherwise disposed of except by trial, judgment and sentence according to the regular course of criminal proceedings." Placing a case on file is thus referred to as a mode by which it is "disposed of"; and is further recognized as a proper mode of disposing of a prosecution for a first offence under the section, and also for a second offence, provided the requirements stated are complied with. I assume that these requirements were complied

with in the case referred to. The statute should not be so construed as to leave no provision whatever as to the license rights of an operator whose case has been disposed of by placing it on file; and yet this result would seem to follow unless the word "acquitted" be construed as broad enough to cover such a disposition. An opinion has been rendered by a former Attorney-General to the effect that an entry of *nolle prosequi* is an acquittal within the meaning of the act. V Op. Atty. Gen. 385. Placing a case on file has the additional element of being the act of the court. *Commonwealth v. Tufts*, 239 Mass. 458, 537. I am therefore of the opinion that, under the facts stated in your fourth question, there was an acquittal within the meaning of that statute.

LEGISLATIVE PRINTING — CLERKS OF THE HOUSE AND SENATE.

All House and Senate bills and all documents intended for presentation to the General Court by any member or member-elect may be printed under the direction of the Clerks of the House and Senate, respectively.

The statutes and the rules of the General Court provide for the printing by the Clerks of certain other documents.

You have orally requested my opinion relative to your authority to contract for legislative printing.

St. 1923, c. 362, § 5, as amended by St. 1923, c. 493, which places State printing, with certain exceptions, under the supervision of the Division of Personnel and Standardization and provides that the Commission on Administration and Finance may make contracts for printing for State departments, specifically provides that the act shall not apply to legislative printing. The authority to contract for legislative printing is, therefore, not affected by that statute.

G. L., c. 5, § 10, provides that one thousand copies of the journals of the Senate and of the House of Representatives shall be printed annually under the direction of the Clerks

To the
Senate and
House of Rep-
resentatives.
1924
September 10.

thereof. St. 1924, c. 492, § 3, provides that the Clerks of both branches of the Legislature shall prepare and print the manual of the General Court. G. L., c. 5, § 12, provides that the joint committee on rules of the General Court shall publish during each regular session of the General Court bulletins of committee hearings. Section 5 of that chapter provides that the joint committee on rules shall prepare and print, from time to time during the legislative session, a cumulative index of all acts and resolves passed.

There is no statute which specifically refers to the printing of bills.

Rule 28 of the rules of the House of Representatives, as amended on May 25, 1923, in part provides: —

Recommendations and special reports of state officials, departments, commissions and boards, reports of special committees and commissions, bills and resolves introduced on leave or accompanying petitions, recommendations and reports, and resolutions, *shall be printed under the direction of the Clerk*, who also may cause to be printed, with the approval of the Speaker, other documents filed as herein provided.

Rule 42 of the rules of the House provides, in part, that “bills shall be printed or written in a legible hand.” Rule 42 should be read in the light of Rule 28. I am accordingly of the opinion that all House bills, in accordance with the rules, should be printed under the direction of the Clerk of the House until some provision to the contrary is made by the Legislature or by the House.

Rule 13 of the joint rules, as amended on May 25, 1923, provides: —

Papers intended for presentation to the General Court by any member or member-elect shall be deposited with the Clerk of the branch to which the member belongs or has been elected; . . .

Papers so deposited and referred previously to the convening of the General Court shall be printed in advance, conformably to the rules and *usages* of the Senate or House, . . . A bulletin of matters so referred shall be printed, under the direction of the Clerks of the two branches, as of the first day of the session.

While the rule does not specifically authorize the Clerks of the respective branches of the Legislature to print such papers, it does not provide for printing in accordance with the rules and *usages* of the Senate or House. In the past, bills have been printed under the direction of the respective clerks. The House rules so provide with respect to House bills. Rule 20 of the rules of the Senate specifically provides that when the President orders bills and resolves to be printed, they shall be printed under the direction of the Clerk. In the absence of any provision to the contrary, and in view of the parliamentary practice, usage and rules, I am of the opinion that the Clerks of the House and Senate, respectively, under Rule 13, may cause to be printed, in advance of the convening of the General Court, all papers referred to in that rule.

ELECTIONS — PRIMARIES — CANDIDATES FOR COUNTY COMMISSIONER.

Under G. L., c. 54, § 157, providing for the election of two county commissioners for certain counties, not more than one of whom shall be from the same city or town, a candidate who has received at the primaries a smaller number of votes than another candidate of the same party from the same town cannot be a nominee, although he has received the second largest number of votes.

You state that at the recent primaries the total vote cast for Republican candidates for nomination as county commissioners of Barnstable County, where two are to be elected, was as follows: —

To the
Secretary.
1924
September 27

John D. W. Bodfish, of Barnstable	.	.	.	1945
Frank G. Thatcher, of Barnstable	.	.	.	1887
Benjamin F. Bourne, of Bourne	.	.	.	1769
Arthur Underwood, of Falmouth	.	.	.	1127

In connection with your preparation of the ballots you ask my advice as to who are the Republican nominees.

G. L., c. 54, § 158, provides for the election of county commissioners. It is provided that "at the biennial state

election in nineteen hundred and twenty-four, and in every fourth year thereafter, there shall be chosen . . . by the voters of each of the other counties (*i.e.*, excepting Middlesex, Suffolk and Nantucket) . . . two county commissioners for the county; . . .” It is further provided as follows: —

Not more than one of the county commissioners and associate commissioners shall be chosen from the same city or town. If two persons residing in the same city or town shall appear to have been chosen to said offices, only the person receiving the larger number of votes shall be declared elected; but if they shall receive an equal number of votes, no person shall be declared elected. If a person residing in a city or town where a county commissioner or an associate commissioner who is to remain in office also resides, shall appear to have been chosen, he shall not be declared elected. If the person is not declared elected by reason of the above provisions, the person receiving the next highest number of votes for the office, and who resides in another city or town, shall be declared elected.

G. L., c. 53, contains provisions relative to primaries. Section 1 provides, in part, as follows: —

At any primary, caucus or convention held under this chapter, each party having the right to participate in or hold the same may nominate as many candidates for each office for which it has the right to make nominations therein as there are persons to be elected to that office, and no more. . . .

Section 24 provides: —

Primaries shall be subject to all laws relating to elections and corrupt practices therein, so far as applicable and except as otherwise provided in this chapter and in chapters fifty-four, fifty-five and fifty-six.

If the Republican nominees for the office of county commissioner for the County of Barnstable are held to be the two persons who received the highest number of votes, then, by virtue of G. L., c. 54, § 158, there will be only one Republican nominee who can be elected. Such a result would, in my opinion, be inconsistent with the provisions of G. L., c. 53, § 1, which authorize each party to nominate as many

candidates for each office as there are persons to be elected to that office, and no more. In my judgment, this section must be interpreted to mean that the candidates who may be nominated are persons who are capable under the law of being elected, and that each party has a right to nominate as many of such candidates for any office therein described as there are persons to be elected to such office. I am confirmed in this opinion by the provisions of G. L., c. 53, § 24, quoted above, which, in my opinion, require a consideration of the provisions of G. L., c. 54, § 158, in connection with the proper interpretation of G. L., c. 53, § 1.

I therefore advise you that, in the case you have stated, the two persons who are entitled to the Republican nomination for the office of county commissioner of Barnstable County are John D. W. Bodfish and Benjamin F. Bourne.

PROBATION OFFICERS — RETIREMENT.

The classes of probation officers entitled or required to be retired under G. L., c. 32, §§ 75 and 76, defined.

The classes of probation officers who must be retired upon reaching the age of seventy years defined.

You have asked my opinion upon the following questions relating to the interpretation of G. L., c. 32, §§ 75 and 76.

To the Com-
mission on
Probation.
1924
October 9.

(1) What classes of probation officers are entitled or required to be retired under the provisions of G. L., c. 32, §§ 75 and 76?

(2) Whether all probation officers are required to be retired upon reaching the age of seventy years?

(3) Whether a probation officer, upon reaching the age of seventy years, having served less than twenty years, is required to be retired?

(4) Whether, if in your opinion a probation officer is required to retire upon reaching the age of seventy years, not having served twenty years, he is entitled to the pension prescribed in section 76?

The original statute providing for pensions for probation officers was St. 1912, c. 723. Sections 1 and 2 of this statute were as follows: —

SECTION 1. Any probation officer or assistant probation officer whose whole time is given to the duties of his office shall, at his or her request, be retired from active service and placed upon a pension roll by the court upon which it is his duty to attend, with the approval of the county commissioners of the county in which the court is situated; *provided*, that he is certified in writing by a physician designated by such court to be permanently disabled, mentally or physically, for further service by reason of injuries or illness sustained or incurred through no fault of his in the actual performance of his duty as such officer. Any probation or assistant probation officer whose whole time is given to his duties as such officer and who has faithfully performed his duties as such officer for not less than twenty consecutive years, and who is not less than sixty years of age, shall also be retired under the provisions of this act at his or her request without the aforesaid certification.

SECTION 2. Every person retired under the provisions of this act shall receive an annual pension equal to one half of the compensation received by him at the time of his retirement, this amount to be paid by the county employing him, or, if he is employed by more than one county, then by the counties by which his salary is paid, and in the same proportion. It shall be the duty of every county to appropriate annually the sums required for this purpose.

This statute provided only for retirement at the option of the probation officer or assistant probation officer who should become entitled to retirement under its terms. Except as such an officer should choose to take advantage of the provisions of the statute, his tenure of office remained, as theretofore, governed by the provisions of those contemporary statutes which were the predecessors of what is now G. L., c. 276, § 83. That is to say, he held office during the pleasure of the court which appointed him.

St. 1916, c. 225, introduced the first provision for compulsory retirement. Section 1 thereof read as follows: —

Any probation officer of any court who shall be eligible to a pension for twenty years' service under the provisions of section one of chapter seven hundred and twenty-three of the acts of the year nineteen hundred and twelve, shall hereafter be retired upon attaining the age of seventy years.

It is quite plain upon the face of this enactment that the only probation officers as to whom retirement became

mandatory were those who, because of their twenty years' continuous full-time service, should become entitled to pensions upon retirement and who should attain the age of seventy years.

G. L., c. 32, §§ 75 and 76, are now as follows: —

SECTION 75. Any probation officer or assistant probation officer whose whole time is given to the duties of his office shall, at his request, be retired from active service and placed upon a pension roll by the court upon which it is his duty to attend, with the approval of the county commissioners of the county in which the court is situated, provided, that he is certified in writing by a physician designated by such court to be permanently disabled, mentally or physically, for further service by reason of injuries or illness sustained or incurred through no fault of his in the actual performance of his duty as such officer. Any such probation officer or assistant probation officer who has faithfully performed his duties for not less than twenty consecutive years, and who is not less than sixty, shall be retired at his request without the aforesaid certification. Such probation officer must be retired upon attaining the age of seventy.

SECTION 76. Every person retired under the preceding section shall receive an annual pension equal to one half of the compensation received by him at the time of his retirement, to be paid by the county employing him, or, if he is employed by more than one county, by the counties by which his salary is paid, and in the same proportion.

The first and second sentences of section 75 have not been materially altered from the form in which they appear in the statute of 1912. In the second sentence the words "such probation officer or assistant probation officer" are substituted for the words "probation or assistant probation officer whose whole time is given to his duties as such officer," the view of the Legislature having apparently been that the omitted description could be incorporated by the use of the word "such," which would refer back to the words in the first sentence of section 75 — "whose whole time is given to the duties of his office." The third sentence of section 75 is plainly intended to be a condensation of the statute of 1916. The word "such" in this sentence was expected to serve as a substitute for the description found

in St. 1916, c. 225 — “who shall be eligible to a pension for twenty years’ service under the provisions of section one of chapter seven hundred and twenty-three of the acts of the year nineteen hundred and twelve.” It therefore refers to the sort of officer who is described in the second sentence of section 75 as “such probation officer or assistant probation officer who has faithfully performed his duties for not less than twenty consecutive years.”

It does not appear with any convincing force that the Legislature, by the various elisions in section 75, intended to alter the pre-existing law. The reaching of this conclusion is aided by the familiar principle “of statutory construction, that mere verbal changes in the revision of a statute do not alter its meaning and are construed as a continuation of the previous law.” *Main v. County of Plymouth*, 223 Mass. 66, 69. *Savage v. Shaw*, 195 Mass. 571. *Derinza’s Case*, 229 Mass. 435, 442. *Ollila v. Huikari*, 237 Mass. 54, 56. I therefore answer your questions as follows:

As to the first: that the probation officers who are entitled to be retired under section 75 are those whose whole time is given to the duties of their office, and who have either been certified in writing by a physician, designated by the court upon which they attend, to be permanently disabled, mentally or physically, for further service, by reason of injuries or illness sustained or incurred through no fault of theirs, in the actual performance of their duty as such officers, and whose retirements have been approved by the county commissioners of the county in which the court is situated, or who have faithfully performed their duties for not less than twenty consecutive years and who are over the age of sixty years; that those probation officers are required to be retired, under the provisions of section 75, who, having reached the age of seventy, are then entitled, by virtue of having given their full-time service for not less than twenty consecutive years, to receive upon retirement the pension provided by section 76, or who, being over the

age of seventy years, have, subsequently to reaching that age, become entitled, for the same reasons, to receive upon retirement such a pension.

As to the second: that only such probation officers are required to be retired upon reaching the age of seventy years as are characterized as subject to such compulsory retirement in my answer to your first question.

As to the third: that a probation officer who, upon reaching the age of seventy years, has served less than twenty years is not required to be retired.

As to the fourth: that it is rendered immaterial by the answer given to the previous questions.

TAXATION — BOARD OF APPEAL.

Under G. L., c. 58, § 27, as amended by St. 1922, c. 382, providing that the Commissioner of Corporations and Taxation, with the approval of the Attorney-General, may abate certain taxes, in cases where they shall appear to have been illegally exacted, excessive or unwarranted, and that the decision of the Commissioner and Attorney-General shall be final, no appeal lies to the Board of Appeal from the refusal of the Commissioner to grant relief under that provision.

My opinion is asked whether an appeal lies to the Board of Appeal from the refusal of the Commissioner of Corporations and Taxation to grant relief under the provisions of G. L., c. 58, § 27, as amended by St. 1922, c. 382, to an applicant for abatement of income taxes. Said section 27, as amended, is, in part, as follows: —

To the Board
of Appeal in
Tax Cases.
1924
November 2.
—

If it shall appear that an income tax, a legacy and succession tax, or a tax or excise upon a corporation, foreign or domestic, was in whole or in part illegally assessed or levied, or was excessive or unwarranted, the commissioner may, with the approval of the attorney general, issue a certificate that the party aggrieved by such tax or excise is entitled to an abatement, stating the amount thereof. If the tax or excise has been paid, the state treasurer shall pay the amount thus certified in such manner as the certificate shall provide, without any appropriation therefor by the general court. No certificate for the abatement of any tax or excise shall be issued under this section unless application therefor is

made to the commissioner within two years after the date of the bill for said tax or excise, or for an amount exceeding the sum which in equity and good conscience ought to be abated under all the circumstances of the case. . . . The decision of the commissioner and attorney general shall be final. . . . This section shall be in addition to and not in modification of any other remedies.

Provision is made in G. L., c. 62, § 43, for application to the Commissioner for abatement of an income tax, and in section 45 for appeal to the Board of Appeal upon refusal of the Commissioner to abate such tax under section 43. There is no other provision in the statutes for appeal to the Board of Appeal from an assessment of an income tax, unless such provision is to be found in G. L., c. 58, § 27.

I understand that the application to the Commissioner for an abatement was made not under G. L., c. 62, § 43, but under G. L., c. 58, § 27, as amended. That section contains an express provision to the effect that "the decision of the commissioner and attorney general shall be final."

In my opinion, it is clear that no appeal lies to the Board of Appeal from the refusal of the Commissioner to grant relief under that section, and that the board is without jurisdiction in the matter.

DRAINAGE LAW — FINANCIAL IMPROVEMENT.

A reclamation district organized under St. 1923, c. 457, under an arrangement whereby the expense of the improvement is to be apportioned between the district and the county, may not issue bonds for the purpose of financing the county's share of the undertaking, with the understanding that the district shall subsequently be reimbursed.

To the Com-
missioner of
Agriculture.
1924
November 7.

You state that plans have been made for construction work required for the proper drainage of the Green Harbor district, the expense of which is to be apportioned between the reclamation district at Green Harbor and the county commissioners of Plymouth County, that the county has no money available from its appropriation of the current year to pay its share of the expense, and that it has been

suggested that the project should be funded by issuing bonds of the district, to which the county's share of the expense is to be repaid as soon as the money is made available by appropriation. You ask my opinion whether such a procedure is permissible.

You state that the district is organized under St. 1923, c. 457, and St. 1924, c. 93. St. 1923, c. 457, provides for the organization of reclamation districts, repealing earlier law on that subject. It is amended by St. 1924, c. 93, in respects not here material.

Provisions for financing proposed improvements in reclamation districts are contained in sections 9 and 10 of the 1923 statute. These sections are, in part, as follows:—

SECTION 9. As soon as possible after the estimate of the expense of the proposed improvements has been made by the commissioners and reported to the board, said commissioners shall request the clerk to call a meeting of the district for the purpose of deciding upon a method of financing such improvements. If the district so votes the commissioners shall petition the county commissioners of the county where the greater part of the land lies, annexing a certified copy of the petition under section five and of the determination of the board thereon, and a statement of the estimated expense of the proposed improvements and shall request the county commissioners to vote to pay in the first instance the total expense involved in making the improvements approved by the board, and the said county commissioners may so vote. To defray any expense incurred by said county commissioners under such vote, the county treasurer, with the approval of the county commissioners, may issue bonds or notes of the county to an amount not exceeding such expense, payable in such period, not exceeding twenty-five years from their dates of issue, as the county commissioners may determine. . . . Payments on account of principal and interest shall be made by the county and repaid to the county by the district.

SECTION 10. The district may, instead of instructing the commissioners to petition the county commissioners as provided in the preceding section, vote to finance the expense of the improvements in accordance with any one of the three methods hereinafter specified. (1) If all the members of the district agree, the district may raise by assessments upon the proprietors or by voluntary contributions and deposit with the state treasurer the total sum required to meet the estimated expense of the improvements. Such deposits shall be held by the state treasurer to the

credit of the district, and payments shall be made therefrom as provided in section fourteen. (2) The district may pay the whole expense of the improvements from time to time as the work is performed and for this purpose may incur debt for a temporary loan in anticipation of the collection of assessments from the members of the district during the calendar year in which said debt is incurred or during the next succeeding calendar year. (3) The district may incur debt to the amount necessary to pay the estimated expense of the proposed improvements and may issue therefor notes or bonds, and may, if the board approves, issue notes or bonds on the condition that the first payment on account of the principal shall be deferred for a period of not more than five years from the date of issue of such notes or bonds and that the whole amount of such debt shall be payable within a period of not more than twenty-five years after such notes or bonds are issued.

The proposed plan for financing the construction evidently is the third method specified in section 10. The phrase "the estimated expense of the proposed improvements" evidently refers to the estimate of the expense of the proposed improvements, which by section 9 is to be made by the district commissioners and reported to the board before any method of financing the improvements is decided upon. I do not understand that any such estimate has yet been prepared; but I must assume that the estimate, when made, will be an estimate of the expense of improvements for which the district will be finally responsible, and that it will not include other costs not to be properly chargeable to the district.

In my opinion, bonds of the district may not be issued for the purpose of financing the county's share of the undertaking, with the understanding that the district is to be repaid by the county when funds are made available.

BOARD OF APPEAL, DELEGATION OF DUTIES.

The duties of the State Treasurer and State Auditor as members of the Board of Appeal constituted by G. L., c. 6, § 21, are official duties, and during their illness, absence or other disability may be performed by their respective deputies, in accordance with G. L., c. 10, § 5, and c. 11, § 2.

You have asked my opinion as to the authority of the State Treasurer and the State Auditor, respectively, to delegate the performance of their duties as members of the Board of Appeal to their deputies or to other persons, and as to the authority of such deputies to perform such duties during the illness, absence or other disability of the State Treasurer or the State Auditor.

To the Board
of Appeal in
Tax Cases.
1924
November 8.

The Board of Appeal is constituted by G. L., c. 6, § 21, which is as follows: —

The state treasurer, the state auditor and a member of the council designated by the governor, shall constitute the board of appeal from decisions of the commissioner of corporations and taxation.

G. L., c. 10, § 5, provides, in part, as follows: —

The state treasurer may, with the consent of the governor and council, appoint, and may for cause with such consent remove, a first and a second deputy treasurer, shall prescribe their respective duties, and, with the approval of the governor and council, shall determine their salaries. *During the illness, absence or other disability of the treasurer, his official duties shall be performed by the said deputies in the order of seniority. . . .*

G. L., c. 11, § 2, provides for the appointment by the State Auditor of a first deputy auditor, in the following terms: —

He shall, with the consent of the governor and council, appoint a first deputy auditor, at a salary to be fixed by the auditor, with the approval of the governor and council, who shall perform such duties as may be assigned to him by the auditor and who may be removed by him for cause at any time, with the consent of the governor and council. *If, by reason of sickness, absence or other cause, the auditor is temporarily unable to perform the duties of his office, the first deputy shall perform the same until such disability ceases.* In the event of a vacancy in the office of

auditor, the first deputy shall be continued in office and shall perform all statutory duties of the auditor until an auditor shall be duly qualified. . . .

The office of second deputy auditor, for which provision is made in G. L., c. 11, § 3, was abolished by St. 1922, c. 545, § 27.

The duties which the Board of Appeal constituted by G. L., c. 6, § 21, is called upon by the statutes to perform, are, in my judgment, official duties. It is therefore my opinion that during the illness, absence or other disability of the State Treasurer or the State Auditor the duties of those officers, respectively, as members of the Board of Appeal may be performed by their deputies, in accordance with the provisions of G. L., c. 10, § 5, and c. 11, § 2, respectively. I am of the opinion that neither the State Treasurer nor the State Auditor has any power to delegate the performance of his duties as a member of the Board of Appeal in any other manner than is provided by the statutory enactments above referred to.

STATEMENTS OF POLITICAL EXPENSES — FILING.

Statements of political expenses required by G. L., c. 55, §§ 16, 17, should not be accepted for filing prior to the last day for filing nominations, in the case of nomination expenses, nor prior to the election, in the case of election expenses.

To the
Secretary.
1924
November 10.

You request my opinion as to whether statements of political expenses, required by G. L., c. 55, §§ 16, 17, may properly be accepted for filing by your office prior to the beginning of the periods referred to in said sections as the periods within which such statements shall be filed.

Section 16 is as follows: —

Every candidate for nomination to a public office shall, within seven days after the last day for filing nominations for that office, and every candidate for election to a public office shall within fourteen days after the election held to fill the office, file a statement setting forth each sum of money and thing of value expended, contributed, or promised by him,

for the purpose of securing or in any way affecting his nomination or election to the office, and the name of the person or political committee to whom the payment, contribution or promise was made and the date thereof, or, if nothing has been contributed, expended or promised by him a statement to that effect.

Section 17 provides that —

The treasurer of every political committee . . . shall, within thirty days after such election, file a statement . . .

Inasmuch as the statements required of candidates for election and of treasurers of political committees must cover the entire period preceding election, any statement filed prior to election is, obviously, incomplete. Although the practical objection to the acceptance of statements of candidates for nomination prior to the last day for filing nominations may not be so serious, I am of the opinion that here, too, statements submitted to your office prior to the date fixed by the statute should not be accepted.

POLICE OFFICER — EXPENSES OF SERVING WARRANT — PAYMENT.

The expenses of a police officer, necessarily incurred in the service of a warrant or *capias* in a criminal case tried in a district court, should be paid by the clerk of the district court.

You request my opinion as to whether expenses incurred by a police officer in connection with the service of a warrant are included in the "fees and expenses of officers" which are to be paid by clerks of district courts under the provisions of G. L., c. 218, § 47.

G. L., c. 262, § 21, provides that an officer serving a precept in criminal cases shall be allowed "the actual, reasonable and necessary expenses incurred in going or returning with the prisoner . . . and if he uses the . . . conveyance of another person, he shall be allowed the amount actually expended by him therefor." The officer must

To the Com-
missioner of
Corporations
and Taxation.
1924
November 11.

certify that the use was necessary and that he paid the amount stated.

G. L., c. 262, § 50, provides that although no officer who receives a salary or an allowance by the day or hour shall be paid any fee or extra compensation for official services performed by him in any criminal case, yet "his expenses, necessarily and actually incurred, and actually disbursed by him, . . . in a criminal case tried in a district court," shall be paid by the town where the crime was committed.

G. L., c. 218, § 47, provides that clerks of district courts "shall" pay "the fees and expenses of officers entitled thereto from the funds in their hands payable to the city or town liable for the payment of such fees and expenses." The expenses herein referred to are the expenses described in G. L., c. 262, §§ 21, 50. See St. 1890, c. 440, § 8. These include expenses necessarily and actually incurred in the service of a warrant or *capias*, as well as of other precepts.

In my opinion, therefore, the expenses to which you refer are properly paid by clerks of district courts under G. L., c. 218, § 47.

INSURANCE — CONTRACTS OF GUARANTY — SECURITY
GUARANTY INSURANCE — CREDIT INSURANCE —
TITLE INSURANCE.

The business of security guarantee insurance is not a form of the insurance business authorized by G. L., c. 175.

You have requested my opinion upon certain questions as they relate to the following facts set forth in your letter:

The Investors Guaranty Corporation of New England is a domestic business corporation formed under the provisions of G. L., c. 156. Among the purposes for which it was organized are the following: —

To examine and guarantee the validity and legality of bonds or other evidences of indebtedness of any private or public corporation; to guarantee the payment of real estate mortgages, also payment of investment bonds and notes secured by

mortgage or otherwise, or unsecured, including the payment of interest thereon at a fixed rate per annum; to undertake in whole or in part the liabilities of any person, firm or corporation.

This corporation desires to begin the transaction of business, and the question has been raised as to whether or not any of the aforesaid purposes constitute the business of insurance under G. L., c. 175.

The questions which you propound are these: —

1. Is there any distinction between a contract of guaranty and a contract of insurance where the guarantor receives a consideration for his guaranty?

2. Do any of the aforesaid purposes purport to permit this corporation to engage in the business of insurance as defined by section 2 of said chapter 175?

3. If the preceding question is answered in the affirmative, are those provisions of this charter which purport to permit the transaction of insurance invalid and of no effect because the corporation was not organized under section 49 of said chapter 175?

4. If the second question is answered in the affirmative, do any of the purposes above specified constitute credit insurance as set forth in the tenth clause of section 47 of said chapter 175?

5. If the second question is answered in the affirmative, do any of the purposes above set forth constitute title insurance as set forth in the eleventh clause of said section 47?

6. May the Commissioner lawfully grant a certificate to said corporation under section 32 of said chapter, provided its capital is sufficient: (a) If question 4 is answered affirmatively and questions 3 and 5 in the negative? (b) If question 5 is answered in the affirmative and questions 3 and 4 in the negative?

7. Is this corporation, in view of the provisions of its charter above specified, governed by the provisions of G. L., cc. 173 and 174?

1. I answer your first question in the affirmative. There are various contracts of guaranty which are not contracts of insurance. A contract of guaranty of such a character is considered by the Attorney-General in VI Op. Atty. Gen. 11.

I am of the opinion that the word "guarantee," as used in the first clause of the purposes of organization, as above set forth, has its primary signification, and relates to a

guarantee by the company of the correctness of its examination into the legality and validity of bonds and other evidences of indebtedness which it makes for its customers, and that the word as used in this clause does not connote "indemnification" to the customer for the loss which he might sustain by the repudiation or non-payment of the evidences of indebtedness. This being so, no power to make contracts of insurance is conferred by the first clause.

2. I answer your second question in the affirmative. The word "guarantee" is often used in a broad sense, including in its scope other contracts than those of pure guaranty, and I am of the opinion that the word "guarantee," as used in the second clause of the purposes of incorporation, in the phrase "to guarantee the payment of," has the broad meaning, and as there used connotes "indemnification" of the owner of the securities whose payment may be "guaranteed" as to the loss which he may sustain by reason of the failure of the makers of such securities to fulfill their obligations to him. As thus used, a power to make contracts of insurance purports to be created in the corporation with relation to the various forms of hazard indicated in the second clause. The carrying into effect of this power will result in the formation of contracts of insurance of the type commonly known as "guaranty insurance," and more specifically as "security guaranty insurance."

This form of insurance is one recognized in many jurisdictions, and in some is made by statute specifically one of the kinds of insurance business which may be transacted within a given State, as, for example, in New York.

The term "guaranty insurance" is not used with any hard and fast meaning, and has been said to be generic in its scope and signification. *People v. Potts*, 264 Ill. 522. It includes various kinds of insurance, and among them the payment of losses sustained by the holders of evidences of indebtedness (*People v. Rose*, 174 Ill. 310; 1 Joyce, Insurance, § 12), including the payment of losses sustained by the holders of debentures [*Finley v. Mexican Inv. Corp.*

(1897), 1 Q. B. 517; *Shaw v. Royce* (1911), 1 Ch. 138; *In re Law Guarantee Soc. v. Munich Re-Ins. Co.* (1912), 1 Ch. 138], and losses by mortgagees (*Penn. Co. v. Central Trust*, 255 Pa. 322).

The contemplated agreement to indemnify, which is signified by the words "guarantee the payment of" in the purposes of incorporation before me, is intended to protect the party purchasing mortgages, bonds and other evidences of indebtedness, with whom such agreement may be made, against loss resulting from a designated hazard connected with such securities and evidences of indebtedness, and falls within the definition of contracts of insurance set forth in G. L., c. 175, § 2.

3. In answer to your third question, I am of the opinion that the provisions of section 49 of chapter 175 must be followed with relation to the organization of corporations formed for any of the purposes mentioned in such chapter. The purpose of carrying on the business of guaranty insurance, as provided for by the articles of incorporation of the company under discussion, is not one of the purposes mentioned in such chapter. It could not therefore lawfully be formed for the purpose of carrying on such kind of insurance business under section 49, nor can it lawfully carry on such business irrespective of the manner in which it was actually formed, by reason of the prohibition of section 3.

4. I answer your fourth question in the negative. Although "credit insurance," the subject of clause 10 of section 47 of chapter 175, is a form of guaranty insurance, the purposes of the corporation under discussion do not purport to empower it to transact all of the numerous kinds of insurance business which fall under the general head of guaranty insurance, but purport to authorize it to do business only as to those kinds of guaranty insurance enumerated in the purposes. Credit insurance relates to the coverage of debts due merchants from customers (*People v. Mercantile Credit Co.*, 166 N. Y. 416; *Strouse v. American Credit*

Ins. Co., 91 Md. 244; Joyce, Insurance, § 12), and the language of clause 10 of section 47 does not extend the meaning of credit insurance beyond its usual signification. In this connection it is to be noted, as casting light upon the intention of the Legislature to give to the words "the business commonly known as credit insurance or guaranty," in section 47, clause 10, only the usual meaning given to "credit insurance," which confines it to the coverage of debts due merchants from customers, that this clause was originally enacted by St. 1896, c. 447, immediately after the opinion of the Supreme Judicial Court in *Claflin v. United States Credit System Co.*, 165 Mass. 501, wherein the court had held that no authority was given by previously existing statutes to incorporate companies "to insure mercantile credits or accounts." The wording of the purposes does not show an intent to empower the corporation to engage in this subsidiary branch of guaranty insurance.

5. I answer your fifth question in the negative. The powers which the second clause of the purposes of organization purports to give to the company do not come within the enumerated purposes of clause 11 of section 47, commonly known as "title insurance." The guarantee of payment of mortgages referred to in the second clause of the purposes of organization does not relate to "any mortgage held or sold by the insurer," as do provisions of clause 11 of section 47, but refers to loss through the non-payment of mortgages with which the insuring company has no connection. The guarantee does not run specifically against loss by reason of encumbrances or defective titles but relates more particularly to loss by reason of non-payment from any cause. The powers given in the first clause of the purposes do not relate to those commonly exercised, in the business of title insurance, as such, nor do they fall within those enumerated in clause 11.

The third clause of the purposes of organization purports to give the power "to undertake the liabilities of any person, firm or corporation." The word "undertake" has, among

other meanings, that of "guarantee." Such a power is a broad one, but it does not give authority to the corporation to hold or sell mortgages or to carry out the other purposes mentioned in clause 11 of section 47, nor does it give authority to engage in the business of credit insurance, within the meaning of clause 10.

6. In relation to your sixth question, I am of the opinion that the purposes of incorporation do not give power to the corporation to engage in either the business of credit insurance or that of title insurance, as defined by clauses 10 and 11 of section 47, respectively, as I have previously indicated, but that the powers given by the purposes of incorporation purport to give to the corporation power to engage in the business of guaranty insurance, so called, in so far as that form of insurance relates to securities of various sorts. This form of the insurance business is not one of the kinds which are authorized by the provisions of chapter 175, so that the Commissioner may not lawfully grant a certificate to the said corporation under section 32 of chapter 175.

7. I answer your seventh question in the negative.

COMMISSIONER OF AGRICULTURE — INSPECTION OF APPLES
— INTERSTATE COMMERCE.

The Commissioner of Agriculture has the right to inspect apples during the process of packing in this Commonwealth notwithstanding a declared intention by the owner to ship such apples to points outside of the Commonwealth.

You request my opinion as to whether the Commissioner of Agriculture has the right to inspect apples during the process of packing in this Commonwealth, in spite of a declared intention on the part of the owner or packer to ship them outside of the State.

G. L., c. 94, §§ 110, 114, read as follows: —

SECTION 110. The commissioner of agriculture shall make and may modify rules and regulations for enforcing sections one hundred to one

To the Com-
missioner of
Agriculture.
1924
November 13.

hundred and seven, inclusive, one hundred and nine and one hundred and twelve, and shall, either in person or by his assistant, have free access at all reasonable hours to each building or other place where apples are packed, stored, sold, or offered or exposed for sale. He may also, in person or by his assistant, open each box, barrel or other container, and upon tendering the market price may take samples therefrom.

SECTION 114. Apples shipped in the course of interstate commerce and packed and branded in accordance with the act of congress approved August third, nineteen hundred and twelve, and known as "The United States Apple Grading Law," shall be exempt from sections one hundred and one to one hundred and seven, inclusive, one hundred and nine, one hundred and ten, one hundred and twelve and one hundred and thirteen.

Apples which are in the process of being packed have not been "shipped in the course of interstate commerce," and therefore section 114 is inapplicable. Nor, in my opinion, apart from the provisions of section 114, is inspection, under section 110, of apples in the process of being packed an interference with interstate commerce, which does not begin until the goods "commence their final movement for transportation from the State of their origin to that of their destination." *Coe v. Errol*, 116 U. S. 517, 525; *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 150.

LANDLORD AND TENANT — LEASE BY PAROL — LESSOR —
CONTRACT TO FURNISH WATER, HEAT, LIGHT, ETC.

St. 1920, c. 555, § 1, imposing a penalty upon any "lessor" who wilfully fails to perform an obligation to furnish water, heat, light, etc., applies to tenancies created by parol as well as by writing.

You request my opinion as to whether St. 1920, c. 555, applies "to tenants at will as well as to tenants under lease."

I assume that you refer to a distinction between a tenancy created by parol and a tenancy created by an instrument in writing. A tenancy at will may be created by an instrument in writing. *Murray v. Cherrington*, 99 Mass. 229.

St. 1920, c. 555, § 1, reads as follows: —

Any lessor of any building, or part thereof, who is required by the terms, expressed or implied, of any contract or lease to furnish water, heat, light, power, elevator service or telephone service to any occupant of the building, who wilfully or intentionally fails to furnish such water, heat, light, power, elevator service or telephone service at any time when the same is necessary to the proper or customary use of the building, or part thereof, or any lessor who wilfully and intentionally interferes with the quiet enjoyment of the leased premises by such occupant, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than six months.

The word "lease," although often used as referring to the written instrument by which a tenancy is created, is also used, in the law, with reference to the letting or creation of a tenancy. This is its primary meaning. In this sense a lease may be made by parol as well as by writing, and although it is provided under G. L., c. 183, § 3, that a lease by parol "shall have the force and effect of an estate at will only," this provision does not make it any the less a lease. *Elliott v. Stone*, 1 Gray, 571, 574. For example, also, in R. S., c. 60, § 26, the term "such lease" is used in reference to the preceding words — "all estates at will."

There is still less reason for restricting the meaning of the word "lessor" to one who lets by an instrument in writing; and, in my opinion, this word, as used in St. 1920, c. 555, is not to be so construed.

CONSTITUTIONAL LAW — TAXATION OF NATIONAL BANKS AND OTHER MONEYED CAPITAL.

A tax on national bank shares at a rate uniform throughout the Commonwealth would not, in conjunction with the present system of local taxation, be constitutional under pt. 2d, c. 1, § 1, art. IV, of the Massachusetts Constitution. Similarly of a corresponding uniform tax upon "other moneyed capital in the hands of individual citizens coming into competition with the business of national banks."

A tax upon such competing moneyed capital at the local property tax rate, with the exclusion of such capital from the Massachusetts income tax, would not offend against the Federal Constitution, nor, though more doubtfully, against Mass. Const. Amend. XLIV.

A tax upon the income of mercantile, manufacturing and business corporations, either as an excise or as an income tax under Mass. Const. Amend. XLIV, would be constitutional; but if imposed under that amendment, it must conform to its limitations.

A tax upon the income of national banks and other financial corporations at a rate lower than that upon the income of mercantile, manufacturing and business corporations would be constitutional, at least if imposed as an excise.

A tax upon the income of national banks under U. S. Rev. Stat., § 5219, cl. 1 (c), need not be at the same rate as the tax upon competing moneyed capital of individuals or copartnerships.

To the Special
Commission
on Taxation.
1924
November 17.

In connection with the performance of the duties imposed upon your Commission by chapter 20 of the Resolves of 1924, you have asked my opinion upon certain questions of law relating to the powers of the General Court in the imposition of taxes upon national banking associations or their shares or property. Before taking up the specific questions a brief preliminary discussion will be helpful.

By Mass. Const., pt. 2d, c. 1, § 1, art IV, the General Court is empowered "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same."

Until the adoption of the income tax amendment in 1915 this clause contained the sole grant of power to levy taxes contained in our Constitution. It will be noted that it authorizes two main classes of taxes, namely: first, property taxes, which are required to be proportional and reasonable;

and second, duties and excises, which are merely required to be reasonable.

Mass. Const. Amend. XLIV is as follows: —

Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements. Any class of property the income from which is taxed under the provisions of this article may be exempted from the imposition and levying of proportional and reasonable assessments, rates and taxes as at present authorized by the constitution. This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises.

This amendment authorizes the imposition of an income tax under certain specific conditions and limitations. It permits the selection of certain classes of property; the imposition of an income tax upon the income of such property, and the exclusion of any class of property thus taxed upon its income from the proportional taxes authorized by the original Constitution. It requires, however, "that the tax shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property." Thus, this amendment, subject to certain express conditions and limitations, has modified the requirement of the original Constitution that property taxes shall be proportional. Except as thus modified this requirement still remains in full force.

The Fourteenth Amendment to the Constitution of the United States provides that no "state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

It is well settled that this limitation does not require equality in taxation, but merely such reasonable classification in the application of tax laws that the result shall not be

so unfair and unequal as to amount to an arbitrary taking of property under the guise of taxation. Thus, this provision imposes little if any limitation beyond that of our own Constitution requiring that both property taxes and excises shall be reasonable.

The most important Federal limitation upon the power to tax national banks grows out of their character as instrumentalities of the Federal government, created by it for the performance of certain of its governmental functions. It is a fundamental limitation, implied from the nature of our government, that the States can impose no tax upon these banks as such instrumentalities or with reference to their shares as the property of the shareholders which will to any extent impair the efficiency of the banks as Federal agencies. For this reason, when the national banking system was first established in 1863, Congress expressly defined the extent to which the States should be permitted to tax the property or shares of these banks. It is settled beyond question that no tax imposed by States upon national banks, their property or their shares, is valid which does not comply with the limitations imposed by this act of Congress. As a result of recent discussions of the matter of national bank taxation, this provision, which has long appeared as section 5219 of the Revised Statutes of the United States, was amended by an act of Congress which became effective March 4, 1923. This act is as follows: —

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may tax said shares, or include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax the income of such associations, provided the following conditions are complied with:

1. (a) The imposition by said State of any one of the above three forms of taxation shall be in lieu of the others.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the

business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within its limits.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares or the net income as above provided of any national banking association owned by non-residents of any State, or the dividends on such shares owned by such non-residents, shall be taxed in the taxing district where the association is located and not elsewhere; and such associations shall make return of such income and pay the tax thereon as agent of such non-resident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section.

The result is that any legislation which you may suggest for the future taxation of national banks, their property or their shares, must comply with the requirements of U. S. Rev. Stat., § 5219, as amended.

For a further discussion of U. S. Rev. Stat., § 5219, of its history and meaning, of the situation which brought about this amendment, and of the recent litigation in Massachusetts concerning bank taxation, I refer you to a communication dated April 12, 1923, sent by me to the House of Representatives in response to an order passed by it, which communication was printed as House Document No. 1441 of that year.

I proceed to the discussion of your specific questions.

The first three questions may be considered together. They are as follows: —

(1) Can the General Court, in the manner permitted under clause 1 (b) of section 5219 of the United States Revised Statutes, pass a law which will impose a tax upon the shares of national banks at a uniform rate throughout the Commonwealth?

(2) If your answer to the previous question is in the affirmative, can such uniform rate be fixed at a rate which is lower than the tax on real and personal property in the city or town in which the national bank is located?

(3) If your answers to questions 1 and 2 are in the affirmative, could the same rate of taxation that would be applied to national banks by such a contemplated statute be imposed upon "other moneyed capital in the hands of individual citizens coming into competition with the business of national banks?"

These questions appear to assume a compliance with the limitations imposed by U. S. Rev. Stat., § 5219, as amended, which, as I have stated, is a necessary prerequisite. The tax suggested is a property tax imposed under the tax powers of the original Massachusetts Constitution upon the shares of national banks as the property of their shareholders. Accordingly, the question is whether such a tax would comply with the proportional requirement of that Constitution.

I interpret these questions as suggesting no fundamental changes in the general policy of the Commonwealth of levying and imposing all taxes upon real estate and upon personal property, not subject to the income tax, by the cities and towns of the Commonwealth at the rates made necessary by the local requirements. These questions appear merely to suggest the selection of two classes of personal property, namely: shares in national banks and "other moneyed capital in the hands of individual citizens coming into competition with the business of national banks," and the taxation of the same either by the Commonwealth or by the cities and towns at a uniform rate throughout the Commonwealth, determined by some method

entirely different from the manner in which local tax rates are determined, and differing substantially from the local rates in the municipality where each bank whose shares are thus taxed is located. It is plain that such a tax would not be valid even though the rates adopted were lower than the rate of taxation on real and personal property in any town in which any national bank was located. It contemplates the taxation of two classes of property upon their capital value as property, at a different rate from the tax of the same character imposed upon real estate and other classes of personal property subjected to this form of taxation. Such a tax would plainly not be proportional. *Portland Bank v. Apthorp*, 12 Mass. 252; *Oliver v. Washington Mills*, 11 Allen, 268; *Cheshire v. County Commissioners*, 118 Mass. 386; *Perkins v. Westwood*, 226 Mass. 268; see, also, *Opinions of the Justices*, 195 Mass. 607, and 220 Mass. 613.

It has been suggested that, as the taxation of national bank shares is limited by a Federal restriction lying entirely outside of the Massachusetts Constitution, the proportional requirement of that Constitution would be satisfied if the General Court adopted a method of taxing bank shares which did not violate the limitations imposed by the act of Congress, and at the same time approached as nearly as possible to a proportional tax without actually being such a tax under our Constitution as an independent instrument.

In my judgment, no such question can now arise, since the Federal statute, as now amended, plainly permits a tax upon bank shares which shall be unquestionably proportional by authorizing the inclusion of those shares in the general local property tax, provided only all other competing moneyed capital is also so included.

It follows that each of these questions must be answered in the negative.

Your fourth question is as follows: —

(4) Would it be repugnant to the provisions of the Federal or the Massachusetts Constitution to impose a tax on "moneyed capital in the

hands of individual citizens coming into competition with national banks" at the local property tax rate, and exclude such capital in the hands of individuals from the tax now imposed upon the income therefrom under the provisions of the income tax law?

In my judgment, such a tax would not be repugnant to the Federal Constitution for it could not be said to be based upon a classification so unreasonable and arbitrary as to amount to a confiscation of property.

The sole question is whether such a method of taxation would comply with the requirements of Mass. Const. Amend. XLIV. "Moneyed capital in the hands of individual citizens coming into competition with national banks" is now subject to an income tax imposed under this amendment, and is exempt from the local property tax. The suggestion is that this class of property be taken out of this income tax and be put back under the local property tax, subject to the proportional requirement, where it was before the adoption of the income tax law in 1916.

The income tax amendment permits that a tax levied under its authority may be "at different rates upon income derived from different classes of property." But it requires that such a tax "shall be levied at a uniform rate throughout the Commonwealth upon incomes derived from the same classes of property." Obviously, moneyed capital employed in the banking business is invested in notes, bonds and money at interest, which classes of property are taxed under the income tax law when owned by citizens generally. The result would be that property of this general character, when representing an investment of banking capital, would be subject to a property tax at the local rate, and when owned by citizens in general not engaged in the banking business would be taxed upon its income only. Whether or not this is permissible depends upon the sort of classification which Mass. Const. Amend. XLIV permits. Does it require that classification to be based upon the fundamental character of the property itself or may the use to which property is put be a basis of classification in the im-

position of taxes under this amendment? If classification based upon the character of the property itself is required, your question must be answered in the affirmative. If classification based upon use is permitted, the tax which the question suggests would seem to be permissible. The Supreme Judicial Court has held that this amendment is to be construed broadly as a grant of an important tax power by the people to the General Court. *Tax Commissioner v. Putnam*, 227 Mass. 522. But it has not as yet had occasion to deal with any question relating to the character of the classification permitted by the amendment. Presumably, if a tax such as this question proposes is put in force, an attack upon its validity will be promptly made in the courts. It is not possible to advise, in view of the absence of authority upon this matter, how such litigation is likely to result. My own judgment is, however, that Mass. Const. Amend. XLIV permits classification of property based upon the use to which it is put or the general character of the business in which it is employed, and that a tax of the nature suggested by your question is thus authorized by the amendment.

Your fifth question is as follows:—

(5) Can the General Court, under the Massachusetts Constitution, impose a tax upon the income of mercantile, manufacturing and business corporations?

I answer this question in the affirmative. By G. L., c. 63, §§ 30–52, an excise tax is now imposed upon such domestic corporations, based in part upon the value of their corporate excess and in part upon their net incomes; and a similar tax is imposed upon such foreign corporations, based in part upon the value of their corporate excess employed within the Commonwealth and in part upon their net incomes derived from business carried on within the Commonwealth. This has been sustained as a valid exercise of the power conferred by the Massachusetts Constitution to impose reasonable excises. *Eaton, Crane & Pike Co.*

v. *Commonwealth*, 237 Mass. 523. There is no doubt that such an excise would be equally valid if the corporate excess feature were eliminated and it were based entirely upon net income earned within the Commonwealth.

It would also be well within the power of the General Court to impose a tax upon the income of such corporations, whether derived from the property owned by them or otherwise, under the provisions of Mass. Const. Amend. XLIV. Such a tax, however, would be, in the main and perhaps entirely, a property tax and not an excise imposed upon a corporate franchise or upon the privilege of doing business within the Commonwealth. To be valid it must, of course, comply with the conditions and limitations contained in that amendment. If different rates were adopted for the income of corporate property from those applied in the taxation of the property of individual inhabitants, difficult questions as to the validity of such a classification would at once arise. As your question can readily be answered in the affirmative by a reference to the power to levy excises, there seems to be no occasion for discussing this last-mentioned phase of the matter further at the present time.

Your sixth question is as follows: —

(6) Would it be repugnant to the Massachusetts and the Federal Constitution for the General Court to pass a law which would establish a rate of taxation on the income of national banks and other financial corporations which was lower than the rate or burden of taxation imposed upon mercantile, manufacturing, and business corporations?

The only limitation imposed upon such a tax by the Federal Constitution or growing out of the nature of the Federal government is that arising from the fact that national banks are instrumentalities of the Federal government and thus beyond the reach of any State taxation which to any extent impairs their efficiency as Federal agencies. Prior to the amendment to U. S. Rev. Stat., § 5219, which became effective March 4, 1923, a valid tax could not be imposed upon the income of a national bank. *Owensboro National Bank v. Owensboro*, 173 U. S. 664.

As amended, however, that section authorizes the States "to tax the income of such associations" upon the condition that, —

In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within its limits.

I have no doubt that a tax upon the income of a national bank which complies with this limitation is valid. The Federal statute, as thus amended, is a conclusive determination by Congress that a tax upon the income of a national bank thus limited will not foster unfriendly competition against them or in any manner impair their efficiency as Federal agencies.

It is also unimportant, in my judgment, whether a tax upon the income of national banks, which otherwise complies with this limitation, is regarded and imposed by a State as an excise or as a property tax. The purpose of U. S. Rev. Stat., § 5219, both in its original form and as amended, was merely to protect the banks from tax burdens which, when compared with the similar burden imposed upon their competitors, would create and foster an unequal and unfriendly competition. *Mercantile Bank v. New York*, 121 U. S. 138; *Merchants' National Bank v. Richmond*, 256 U. S. 635.

In determining questions which have come before it under this Federal statute the Supreme Court of the United States has always regarded the burden and the effect of the tax. It has paid little attention to mere matters of form. In my judgment, section 5219, as amended, authorizes the imposition by a State of any form of tax upon or measured by the income of a national bank permitted by its Constitution, provided the specific limitations mentioned in the section are observed. So far as the Federal law is concerned, therefore, the General Court may impose a tax

upon the income of national banks either under its general power to levy excises or under the power granted by Mass. Const. Amend. XLIV to impose income taxes.

In my judgment, the carrying on of business within the Commonwealth by a national bank, under its corporate franchise and subject to the protection of our laws, is a proper object of an excise, even under the somewhat narrower rule stated by our court in *Gleason v. McKay*, 134 Mass. 419, and *O'Keeffe v. Somerville*, 190 Mass. 110, to the effect that no valid excise can be imposed upon the exercise of a natural right. Of course, it is true that, unlike the foreign corporation, a national bank cannot be excluded from the Commonwealth. Nor can regulations be imposed upon its methods of business which would interfere with the performance of its governmental functions. Yet, as is pointed out in *Greves v. Shaw*, 173 Mass. 205, 208, such banks are, by the Federal statutes creating them, given a definite local status. They are in fact exercising their corporate franchises here, and their business is subject to all the general laws of the Commonwealth which do not conflict with any specific Federal statute or impair their efficiency as Federal agencies. As decided in the last-mentioned case, their shares are within the jurisdiction of the Commonwealth as property for the purpose of descent and distribution and also for the purposes of a legacy and succession tax, even when owned by non-residents of the Commonwealth. Thus, in many respects they partake of the nature of domestic corporations rather than that of foreign corporations. The position of these banks is somewhat analogous to that of foreign corporations carrying on within the Commonwealth a business consisting solely of interstate commerce. Such corporations cannot be excluded from the State, but our court has held that even though their business is solely interstate commerce it is a proper object, under our Constitution, for the imposition of an excise. *Alpha Portland Cement Co. v. Commonwealth*, 244 Mass. 530.

In my judgment, therefore, an excise tax measured by

a specific percentage of the net income of national banks and other financial corporations would be valid both under the Federal and State Constitutions, provided the limitations of U. S. Rev. Stat., § 5219, cl. 1 (c), were observed, and the tax was not at a higher rate than that assessed upon other financial corporations or than the highest rate assessed upon mercantile, manufacturing and business corporations doing business within the State.

In view of the conclusions just stated, it seems unnecessary to discuss further whether a tax such as is suggested could be validly imposed under Mass. Const. Amend. XLIV. As already stated, the Federal statute, in its amended form, is broad enough to permit either an excise or a property tax. The difficulty would come in attempting to frame a tax under the amendment, of the character suggested by your question, which would not run counter to the limitations of the amendment requiring income of all property of the same class to be taxed at a uniform rate throughout the Commonwealth. There seems to be no occasion for considering the difficult questions of classifications which would thus arise, when the desired result can be reached, without raising those questions, under the power to levy excises. With these reservations the answer to your sixth question is therefore in the negative.

Your seventh question is as follows: —

(7) If a tax is imposed upon the income of national banks under the provisions of clause 1 (c) of said section 5219 of the Federal statutes, would it be necessary, to conform to the provisions of said section, to impose a tax at the same rate upon other moneyed capital in the hands of individuals or copartnerships coming into competition with national banks?

The answer to this question is in the negative. U. S. Rev. Stat., § 5219, as amended, permits the States to choose one, but only one, of three methods of taxation, namely: a tax upon the shares as property; an income tax upon the dividends derived from the shares; or a tax upon the income

of the bank. If the tax upon the shares is chosen, then the limitation stated in clause I (b) becomes effective, and the tax must be not at a greater rate than is assessed upon other moneyed capital as defined in that clause. If an income tax upon the dividends is chosen, the only limitation is that imposed by clause 1 (d), that the tax shall not be at a greater rate than is assessed upon the income of other moneyed capital. If, on the other hand, as your question assumes, a tax is imposed upon the income of the bank itself, then the only limitation is that imposed by clause 1 (c), namely: "that the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within its limits." The limitation imposed by clause 1 (b) plainly has no application to a tax imposed upon the income of the bank.

INSURANCE — CONTRACTS OF INSURANCE — SERVICE CONTRACTS.

A contract to render services to the owner of an automobile, and to reimburse him for a portion of all expenditures for towing, is not a contract of insurance.

To the Com-
missioner of
Insurance.
1924
November 17.

You have asked my opinion as to whether a certain form of contract, called "Service Contract A," which is made with its customers by the Liberty Automobile Service League, Inc., constitutes a contract of insurance under the provisions of G. L., c. 175, § 2.

Under the provisions of the contract, a copy of which you have submitted with your letter, the League agrees, for a stated consideration paid by the other party to the contract, to "furnish and render unto him the following services":

(1) The association will represent said owner in the adjustment of any claim or controversy whatsoever relative to the use, maintenance and operation of said automobile.

(2) The association will help members in the financing and purchasing of new or second hand cars and list their machines for sale or exchange.

(3) The association maintains a purchasing department for the benefit of its members, furnishing them with tires and accessories at a substantial discount.

(4) Call the nearest garage available and have your car towed in. Get a receipted bill and the association will reimburse you, maximum five dollars. Mail us a receipted bill giving membership number, motor number and make of car.

(5) The influence and co-operation of the association will be used in all movements pertaining to the improvement of highways and the betterment of automobile conditions.

With the exception of the fourth, the foregoing agreements made by the League are contracts to render service, and are not contracts of insurance. Each of these agreements lacks the distinguishing feature of payment of loss or reimbursement which is essential to the formation of a contract of insurance under the provisions of our statutes. A long line of opinions by my predecessors in office has recognized the distinction between contracts to render service and contracts of insurance, and the principles of law involved therein are set forth and the earlier opinions of the Attorneys-General are cited in VI Op. Atty. Gen. 150, 151. The decisions to which you refer, *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, and *Physicians' Defense Co. v. Cooper*, 199 Fed. 576, do not recognize the line of distinction between the two classes of contracts that has been the basis of the opinions of former Attorneys-General of this Commonwealth, are in conflict with decisions of courts of last resort in other jurisdictions, and are not authoritative in this Commonwealth.

The fourth agreement made by the League in this "Service Contract," which relates to towing, although providing for reimbursement of expense incurred by the other party to the contract, to the extent of five dollars, is not a contract of insurance. In the terms in which it is drawn the element of hazard or risk is absent. The reimbursement which is to take place is not predicated upon the happening of any

accident or of any casualty or of any specific event. The other party to the contract may at any time, for any reason whatsoever, elect to have his car towed, and may thereafter collect five dollars from the League. That loss which is to be reimbursed should be caused by occurrences outside the direct control of the parties to the contract, is of the essence of insurance.

The contract contains also a statement under the heading "Additional Services," as follows:—

The Liberty Automobile Service League, a voluntary association of automobile owners, has retained counsel to render legal services to the association in advice and counsel as requested, and to render legal services to the individual members of the association when retained directly by such members or any of them, for a period of 2 years.

Then follows a detailed statement of services to be included.

This is merely a statement that the League has retained counsel whose services will be available to members if employed by them. The seventh clause thereunder, providing that the association will furnish to its members a \$5,000 bail bond, is not in itself a contract of insurance.

I am of the opinion that the instrument called "Service Contract A" is not a contract of insurance.

TEACHERS' RETIREMENT. ASSOCIATION — MEMBERSHIP.

Supervisors of adult alien education, employed under G. L., c. 69, § 9, are not teachers employed in a public day school, within the meaning of the teachers' retirement law.

You request my opinion as to whether the teachers' retirement law, G. L., c. 32, §§ 6-19, applies to supervisors of adult alien education.

These supervisors are employed under the provisions of G. L., c. 69, § 9, which is as follows:—

The department, with the co-operation of any town applying therefor, may provide for such instruction in the use of English for adults unable to speak, read or write the same, and in the fundamental principles of

government and other subjects adapted to fit for American citizenship, as shall jointly be approved by the local school committee and the department. Schools and classes established therefor may be held in public school buildings, in industrial establishments or in such other places as may be approved in like manner. Teachers and supervisors employed therein by a town shall be chosen and their compensation fixed by the school committee, subject to the approval of the department.

The word "teacher" as used in G. L., c. 32, § 7, providing for membership in the Teachers' Retirement Association, is defined in section 6 of that chapter as "any teacher, principal, supervisor or superintendent employed by a school committee or board of trustees in a public day school in the commonwealth."

"Public school" is defined in this same section (as amended by St. 1924, c. 281) as "any day school conducted in the commonwealth under the superintendence of a duly elected school committee, also any day school conducted under sections one to thirty-seven, inclusive, of chapter seventy-four."

I am of the opinion that supervisors of adult alien education cannot be said to be employed in "a public day school" within the meaning of this provision. The question seems to have been settled by the opinion of my predecessor holding that schools and classes maintained under Gen. St. 1919, c. 295 (continued in G. L., c. 69, § 9), are not public schools. In this opinion it is said (V Op. Atty. Gen. 573):

The phrase "public schools," as used in the Constitution and the laws of this Commonwealth, has acquired a common and well-settled meaning. It refers and is limited to schools which form a part of the general system of education for the children of the Commonwealth, and which are the kinds of schools that cities and towns are by statute required to maintain as a part of our system of common education (R. L., c. 42, § 1), and that children of legal school age are obliged to attend (R. L., c. 44, § 1).

Schools or classes established and maintained for the instruction of voluntary pupils in certain specified branches of education, which do not form a part of the general system of education which the law requires cities and towns to maintain, are not included within the meaning of said term.

I see no reason to question the soundness of this opinion. It follows that a supervisor employed for the purpose of giving instruction in such schools and classes under G. L., c. 69, § 9, is not a teacher employed in a public day school in the Commonwealth, within the meaning of the teachers' retirement law.

INSURANCE — BROKERS' LICENSE — FEE.

An applicant for an insurance broker's license is not exempt from payment of a fee because of previous service as a woman nurse in the United States Army.

To the Com-
missioner of
Insurance.
1924
November 19.

You request my opinion as to whether a certain applicant for an insurance broker's license under G. L., c. 175, § 167A, a new section enacted by St. 1924, c. 450, is exempt from paying the fee prescribed by sections 166 and 167, on the ground that the applicant, whom I assume from the use of the word "she" in your letter to be a woman, served as a nurse in the United States Army during the World War.

The certificate which you state has been filed with you, for the purpose of establishing such exemption, recites that the applicant "was called into service of the United States, February 18, 1918, as a nurse in the United States Army, from civil life and assigned to Base Hospital, Camp Devens, Massachusetts."

The statute relative to the proposed exemption reads as follows: —

No fee for a license issued under section one hundred and sixty-six or one hundred and sixty-seven shall be required of any *soldier, sailor or marine* resident in the commonwealth who has served in the army or navy of the United States in time of war or insurrection and received an honorable discharge therefrom or release from active duty therein, if he presents to the commissioner satisfactory evidence of his identity.

In my opinion, the language of this statute is not applicable to female nurses who have served in the Army of the United States. The words used in the statute designating

those entitled to exemption are "any soldier, sailor or marine." These words do not describe women nurses. There are no phrases used in this statute which would enlarge the usual meaning of these words so as to include women nurses, such as have been used in other statutes relative to the status of "veterans" or of persons who "voluntarily enlisted" in the military service. Gen. St. 1918, c. 92; G. L., c. 31, § 21.

The ordinary meaning attached to the word "soldier," as used in relation to the forces of the United States Army, is that of an enlisted man. Enlistment is of the essence of the status of such a soldier. *In re Grimley*, 137 U. S. 147. As was pointed out in an opinion by one of my predecessors in office. (V Op Atty. Gen. 471), women nurses are not "enlisted" in the United States Army in the ordinary technical sense of the term. Under the Federal statutes and the practice of the War Department, they do not acquire the status of soldiers (U. S. Comp. Stat. 1918, Title XIV, §§ 1831-3). In the absence from the statute under consideration of definitive phrases enlarging the ordinary meaning of the word "soldier," it must be taken in its usual sense, which does not connote a woman nurse.

DEPARTMENT OF PUBLIC WORKS — AUTHORITY TO SELL CERTAIN LAND BELONGING TO THE COMMONWEALTH.

The Department of Public Works, as the successor of the Commission on Waterways and Public Lands, which succeeded the Board of Harbor and Land Commissioners, is not authorized to sell and convey land of the Commonwealth in the absence of specific authority from the Legislature.

You request my opinion as to the right of the Department of Public Works to sell a certain lot of land without specific authority from the Legislature.

It appears that under the provisions of St. 1898, c. 469, and St. 1899, c. 447, the Board of Harbor and Land Commissioners constructed jetties at the entrance to Green

To the Com-
missioner of
Public Works.
1924
November 25.

Harbor in the town of Marshfield. In connection with the construction of the southerly jetty the lot of land in question, measuring one hundred feet on the beach and fifty feet on the adjoining property, was purchased by the Commonwealth for \$250, in order to secure access to the inshore end of this jetty. The Commonwealth received a warranty deed under date of September 3, 1898, which has been duly recorded in the Plymouth County registry of deeds. Said deed contains a provision that no building shall be erected upon the lot.

The Board of Harbor and Land Commissioners was abolished by Gen. St. 1916, c. 288, and all the rights, powers, duties and obligations conferred and imposed by law on said board were thereby transferred to the Commission on Waterways and Public Lands, which was created by said act. By Gen. St. 1919, c. 350, § 111, the Commission on Waterways and Public Lands was in turn abolished and all the rights, powers, duties and obligations of said Commission were thereby transferred to the Department of Public Works, which was established by said act and which was thereby made the lawful successor of said Commission. By section 113 it was provided that the Department of Public Works shall be organized in two divisions, namely, a Division of Highways and a Division of Waterways and Public Lands. The duties of said Division of Waterways and Public Lands relative to Commonwealth lands are set forth in G. L., c. 91, § 2, which provides as follows: —

The division shall, except as otherwise provided, have charge of the lands, rights in lands, flats, shores and rights in tide waters belonging to the commonwealth, and shall, as far as practicable, ascertain the location, extent and description of such lands; investigate the title of the commonwealth thereto; ascertain what parts thereof have been granted by the commonwealth; the conditions, if any, on which such grants were made, and whether said conditions have been complied with; what portions have been encroached or trespassed on, and the rights and remedies of the commonwealth relative thereto; prevent further encroachments and trespasses; ascertain what portions of such lands may be leased, sold or improved with benefit to the commonwealth and without injury to navi-

gation or to the rights of riparian owners; and may lease the same. It may sell and convey, or lease, any of the islands owned by the commonwealth in the great ponds. It may make contracts for the improvement, filling, sale, use or other disposition of the lands at and near South Boston known as the Commonwealth flats, may lease any portion thereof with or without improvements thereon, may regulate the taking of material from the harbor and fix the lines thereon for filling said lands. All conveyances and contracts, and all leases for more than five years, made under this section shall be subject to the approval of the governor and council.

In an opinion of one of my predecessors to the Board of Harbor and Land Commissioners, dated March 23, 1904 (II Op. Atty. Gen. 479), it was decided that the Board of Harbor and Land Commissioners was not authorized to sell and convey certain land of the Commonwealth, and that if such a sale were desirable competent authority must be secured to effect it. Inasmuch as the Division of Waterways and Public Lands of the Department of Public Works is the successor of the Board of Harbor and Land Commissioners, the reasons set forth in said opinion apply with equal weight to the present instance.

Where the Legislature desires a department to exercise its discretion to dispose of lands of the Commonwealth no longer needed, it grants that power in specific terms. In the absence of such granted power, it is my opinion that your Department cannot sell the land in question without specific authority from the Legislature.

RECLAMATION DIVISION — LAND OF THE COMMONWEALTH — AUTHORITY OF OFFICIALS.

Officials have no power to institute petitions for, nor to make the Commonwealth or municipalities parties in, a reclamation project, under G. L., c. 252, §§ 1 and 5, as amended.

You have asked my opinion upon certain matters connected with the work of the Reclamation Division. Your inquiries are set forth in your letter in the following language: —

To the Commissioner of
Agriculture.
1924
December 2.

We should therefore like to know whether, under the present language of the law (G. L., c. 252, as amended by St. 1923, c. 457, and by St. 1924, c. 93), a town or a State authority having charge of an institution, highway or other public property or improvement can be a member of a reclamation district, with the same rights, powers, duties and obligations as members who are individual persons.

We understand that the State or county, even though it might have land involved in a reclamation district, would not be subject to assessment. Is this correct? It sometimes happens also that a highway location is laid out across a marsh which the authority locating the highway is not empowered to drain, even though a better foundation could be obtained by drainage and the ultimate cost of constructing the highway much reduced by this means.

Would the State, county or town highway authorities, under the present law, have authority to petition for the establishment of a reclamation district to deal with such a situation?

State, county or town authorities or officials who have charge of real property hold the same as representative or agents of the State, county or town which they serve. They do not themselves have such title to the property in their charge as to bring them within the term "proprietors," as used in the above-named statutes, the material provisions of which in this regard are as follows.

G. L., c. 252, §§ 1 and 5, as amended by St. 1923, c. 457, § 1:—

SECTION 1. If it is necessary or useful to drain or flow a meadow, swamp, marsh, beach or other low land held by two or more proprietors, or remove obstructions in rivers or streams leading therefrom, such improvements may be made as provided in the fifteen following sections.

.

SECTION 5. The proprietors of any area described in section one or a majority in interest either in value or area, may petition the board setting forth their desire to form a reclamation district, as provided in the following section, stating the proposed name of said district, the necessity or desirability of the same, the objects to be accomplished, and a general description of the lands proposed to be affected, together with the names of known owners of said lands. . . .

The Commonwealth, a county or a town, as the case may be, is the "proprietor" of the land held by officials, within

the meaning of the statutes. The fact that the Commonwealth, a county or a town is the owner of real property within a territory which might be made into a reclamation district by petition of the proprietors of land in such territory will not prevent the formation of such a district, and the Commonwealth, a county or a town will thereafter be treated as one of the proprietors within such district. The Commonwealth or a county which holds the land in such district for a public purpose will not, however, be subject to assessments upon its land in the district, as will other proprietors therein.

State, county or town highway authorities are not invested with power to institute petitions on behalf of the governmental agencies which they respectively represent, for the formation of reclamation districts, and in the absence of specific legislative authorization are not competent to become petitioners themselves nor to make the Commonwealth, a county or a town a petitioner for such a purpose.

LEGISLATIVE PRINTING — CLERKS OF THE HOUSE AND SENATE — ATTORNEY GENERAL.

The statutes exclude legislative printing from the supervision and control of the Commission on Administration and Finance.

The power to contract for such printing, with certain exceptions, is lodged with the Clerks of the House and Senate.

In the absence of fraud or collusion, the jurisdiction of the Attorney-General is limited to passing upon the legal form of the contract.

You call my attention to the contract for legislative printing which the Clerks of the House and Senate propose to execute. You assert that the contract is not being awarded to the lowest bidder, and that the contract, if executed, will involve an increased expenditure of some thousands of dollars. You request me to prevent the execution of such a contract with the higher bidder and, I presume, to compel the Clerks of the House and Senate to award the contract to the lower bidder.

To the Commission on Administration and Finance.
1924
December 5.

The entire matter has been given careful consideration by me, and all the parties in any way interested or involved have been given ample opportunity to be, and were, fully heard by me. The statutes exclude legislative printing from the supervision and control of your Commission, and give the power to contract for such printing, with the exception of bulletins of committee hearings, to the Clerks of the House and Senate. It is for them to take into consideration the circumstances and facilities of the bidders for the work, as well as the terms offered, and to award the contract to such person or persons as in their judgment the interests of the Commonwealth may require. The power and the accompanying responsibility are theirs. The power to publish bulletins of committee hearings is lodged by statute in the joint committee on rules.

The Attorney-General is not given any jurisdiction in the matter, either by statute or under the common law, in the absence of fraud or collusion. You have orally stated to me that there is no suggestion of fraud or collusion in connection with the proposed contract.

It is clear, therefore, that there is no power in the Attorney-General either to prevent the execution of the contract or to compel the awarding of the contract to a different bidder. The jurisdiction of the Attorney-General in this matter at this time is limited to passing upon the *legal form* of the contract, when requested so to do by the Clerks of the House and Senate.

INSURANCE — STATUTORY CONSTRUCTION — REINSURANCE.

The words "one half of an individual risk," as used in G. L., c. 175, § 20, with relation to the maximum amount of permitted reinsurance, mean one half of the face amount of the policy.

To the Com-
missioner of
Insurance.
1924
December 13.

You ask my opinion upon a question of law having to do with the interpretation of that part of G. L., c. 175, § 20, which provides that "no domestic life company shall re-

insure its risks without the written permission of the commissioner, but may reinsure not exceeding one half of an individual risk."

In your letter you point out that a question has arisen as to the meaning of this statutory provision, and you set forth the following facts:—

A certain life company now under examination has been reinsuring one half of the face amount of the policy without the consent of the Commissioner. If it, *v. g.*, should issue a policy for \$60,000 to a person already insured by it under a policy for \$40,000, it would reinsure \$50,000 without permission, that is, one half of the total insurance of \$100,000.

The contention is made that in the case premised it could not lawfully reinsure more than one half of the difference between the reserve value of the \$60,000 policy, taken at \$30,000, and the face amounts of both policies, \$70,000, or \$35,000 without such permission.

You ask to be advised whether the words "one half of an individual risk" mean one half of the face amount of the policy or policies, or whether they mean one half of the difference between the reserve accumulated and the face of the policy.

The word "risk," as used in the statute under consideration, in my opinion, means simply the amount of the loss which the insurer is liable to pay on the death of the insured. It has no relation to the particular fund out of which payment must be made, whether reserve, surplus, capital or amount received by assessment of its members. The liability of the insurer is for the amount written in the policy or policies. This liability is not changed by the accumulation and allocation of a reserve or other similar fund, whose creation, though affecting the probabilities as to the insurer's ultimate depletion of its capital or other basic resources, does not affect the amount of its obligation.

In my opinion, therefore, the words of the statute to which you direct my attention, "one half of an individual risk," mean one half of the face amount of the policy or policies written for the life of the insured.

RESALE OF THEATRE TICKETS — LICENSE — “ENGAGED IN BUSINESS.”

A person may be engaged in business even though service is rendered without charge to the customer and is a matter of accommodation to him.

Theatre tickets are not property in the ordinary sense but are primarily revocable licenses.

The term “reselling,” as used in St. 1924, c. 497, should be construed as the transfer or disposal of a legal or equitable right to a ticket of admission, or to some other evidence of such right of entry, for a consideration.

Whenever any one makes a regular course of business of such transactions he becomes subject to the provisions of the act.

To the Com-
missioner of
Public Safety.
1924
December 17.

You have requested my opinion as to whether the Jordan Marsh Company, of Boston, is required to be licensed under the provisions of St. 1924, c. 497, entitled “An Act to regulate the sale and resale of tickets to theatres and other places of public amusement as a matter affected with a public interest in order to prevent fraud, extortion and other abuses,” by reason of the service it furnishes its patrons in obtaining theatre tickets. You describe the course of conduct of the company as follows: —

It appears that the Jordan Marsh Company takes orders for tickets and collects the money therefor, and by phone or other means makes the reservations at the theatre office and issues to the purchaser some sort of order, upon receipt of which at the theatre box office the tickets so reserved are delivered to the purchaser without any further payment therefor.

For this service the company makes no charge.

The statute describes the persons who must be licensed thereunder as those who “engage in the business of reselling any ticket or tickets of admission or other evidence of right of entry to any theatrical exhibition, public show or public amusement or exhibition required to be licensed under sections one hundred and eighty-one and one hundred and eighty-two, whether such business is conducted on or off the premises on which the ticket or other evidence is to be used.” St. 1924, c. 497, § 2.

The crucial words for your present purposes are, — “engaged in the business of reselling.”

It is clear that the Jordan Marsh Company, in pursuing the course of conduct described, is engaged in business, even though the service is rendered without direct charge to the customer and is a matter of accommodation to him. *Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47, 55. The word "sale" has a well-defined meaning.

In *Arnold v. North American Chemical Co.*, 232 Mass. 196, 199, the court said:—

It is the transfer of property from one person to another for a consideration or value. The word implies *ordinarily* the passing from seller to buyer of the general and absolute title to property as distinguished from a special interest, a bailment, a license, a lease, a pawn or other limited right falling short of complete ownership.

See also G. L., c. 106, § 3, commonly called the "Sales Act."

Theatre tickets, however, are not property in the ordinary sense but are primarily revocable licenses, and "while it may be assumed that the resale of a theatre ticket transfers all the right of the original purchaser, the transaction relates to property of such tenuous nature as to render it peculiarly liable to abuses." *Opinion of the Justices*, 247 Mass. 589, 596.

To construe the word "resale" under the provisions of St. 1924, c. 497, as a transfer of the general and absolute title would exclude from its operation a great number of potential transactions which might be clearly subject to the abuses which the statute was intended to obviate. I am of the opinion that the word "reselling" was not used in this act in its ordinary meaning or with the precise and close signification given that term in the Sales Act. Nor does the statute make immediate and tangible gain the criterion of a "resale." Tickets purchased and transferred to another person for less than the purchase price are none the less resold.

In my opinion, the term "reselling," as used in St. 1924, c. 497, should be construed as the transfer or disposal of

a legal or equitable right to a ticket of admission, or to some other evidence of such right of entry, for a consideration, and that whenever any one makes a regular course of business of such transactions he renders himself subject to the provisions of that act. To become subject to the statute a person must have acquired some such right to the tickets, which right he disposes of or transfers for a consideration. If no such right is acquired by the person whom it is sought to subject to the provisions of the law, that person cannot be held to be "engaged in the business of reselling" tickets.

Applying these principles to the instant case, if the Jordan Marsh Company acquires any legal or equitable rights to theatre tickets and disposes of such rights to its patrons for a consideration, even though there be no immediate and tangible profits in such transactions, it is engaged in the business of reselling tickets and must be licensed under the provisions of St. 1924, c. 497. If, however, the Jordan Marsh Company does not acquire any such rights in such tickets, and acts either as the agent of the theatre in selling tickets or as the agent of its patrons in buying tickets, and all rights in the tickets are transferred directly from the theatre to the patron, it is not engaged in the business of reselling tickets and is not subject to the provisions of the act.

CIVIL SERVICE — SECRETARY APPOINTED BY THE CITY COUNCIL OF BOSTON.

The appointment of a secretary by the city council of Boston, under St. 1909, c. 486, § 1, is not within civil service.

To the Commissioner of
Civil Service.
1924
December 17.

You ask my opinion as to whether the appointment of a secretary by the city council of Boston, under St. 1909, c. 486, § 1, is within the civil service.

In my opinion, this appointment is not within civil service. St. 1909, c. 486, § 1, reads, in part, as follows: —

. . . The city council may, subject to the approval of the mayor, from time to time establish such offices, other than that of city clerk, as it may deem necessary for the conduct of its affairs and at such salaries as it may determine, and abolish such offices or alter such salaries; and without such approval may fill the offices thus established and remove the incumbents at pleasure.

The words "may fill the offices thus established and remove the incumbents at pleasure" seem to me inconsistent with any legislative intent that such appointments or removals shall be subject to civil service. *Cf. V. Op. Atty. Gen. 537.*

INSURANCE — CONTRACT OF INSURANCE — BOND FOR HOSPITAL EXPENSES.

An undertaking by an insurance company to pay hospital expenses incurred in a specified way, in consideration of a premium, is not a contract of suretyship but a contract of insurance.

You have submitted to me copies of two instruments, styled respectively "Hospital Bond" and "Application for a Hospital Bond," issued by a foreign insurance company licensed to do business in this Commonwealth as surety, but not to insure against sickness or bodily injury. The bond purports, in consideration of a stated premium, to guarantee to any hospital in the United States or Canada payment of all expenses which may be incurred within one year thereafter at any such hospital by the other contracting party (called the "principal assured") or members of his immediate family, named therein, not exceeding the amounts therein specified and subject to certain other conditions as stated therein. Payments are to be made directly to the hospital involved. In the application the applicant agrees to pay a stated annual premium upon the signing of the application. No obligation is expressed or implied in either instrument that the "principal assured" shall repay to the company any sum paid out by it under the bond.

You ask the following questions: —

To the Com-
missioner of
Insurance.
1924
December 30.

1. Does the company in issuing such a contract act as a surety on a bond or other obligation within the meaning of the fourth clause of G. L., c. 175, § 47, or, in other words, is such a contract one of suretyship?

2. If you answer the preceding question in the negative, does the said contract constitute one of insurance against loss or damage on account of accident or sickness, and therefore subject to section 108 of said chapter?

3. If you answer the two preceding questions in the negative, does the making of said contract involve the transaction of a form of insurance which is unlawful under section 3 of said chapter because not specifically permitted by said section 47 and which can be transacted only by special license of the Commissioner under clause (g) of section 51 of said chapter?

1. It is essential to the relation of suretyship that there shall be a valid and binding obligation owed by the principal to a creditor, for the payment or performance of which the surety undertakes to make himself collaterally liable. *Thornberg v. Allman*, 8 Ind. App. 531; *Russell v. Failor*, 1 Ohio St. 327; *Roberts v. Hawkins*, 70 Mich. 566. See *Canton Institution for Savings v. Murphy*, 156 Mass. 305; *Burdett v. Walsh*, 235 Mass. 153. The undertaking of the company, as is shown by the bond and application, is to pay hospital expenses when incurred according to the terms of the bond, and not to be surety for their payment by another. It is my opinion, therefore, that the contract with the "principal assured" is not a contract of suretyship. Accordingly, I answer your first question in the negative.

2. A contract of insurance is defined by G. L., c. 175, § 2, as follows: —

A contract of insurance is an agreement, by which one party, for a consideration promises to pay money or its equivalent, or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the other party has an interest.

The basis of this definition is to be found in the opinion of Gray, J., in *Commonwealth v. Wetherbee*, 105 Mass. 149, 160, in which he said the following: —

A contract of insurance is an agreement, by which one party, for a consideration, (which is usually paid in money, either in one sum, or at different times during the continuance of the risk,) promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance, the thing insured is property; in life or accident insurance, it is the life or health of a person. In either case, neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract.

In I Op. Atty. Gen. 345, Attorney-General Knowlton said regarding this definition:—

This definition first appears in St. 1887, c. 214, § 3. It was taken from an opinion of Gray, C. J., in *Commonwealth v. Wetherbee*, 105 Mass. 149, and was undoubtedly adopted by the Legislature as a judicial interpretation of the meaning of the word; but an examination of the case cited shows that it was not intended in the opinion to limit the common-law definition of insurance.

The nature of the contract between the company and the “principal assured” is to be ascertained from the terms of the bond and application. The use of the words “assured,” “insurance” and “premium” tends to show that the contemplated arrangement, as the parties viewed it, was one of insurance. The intention shown by the instrument appears to be to provide insurance for the “principal assured” and designated members of his family, in consideration of a premium to be paid, against certain losses, to wit, hospital expenses, consequent upon possible accident or ill health. The contract was not intended to be one for personal services. The “Hospital Bond,” when duly executed by the parties, is, in my opinion, a contract of insurance within the statutory definition quoted above. See I Op. Atty. Gen. 544; V Op. Atty.

Gen. 206; *Physicians' Defense Co. v. Cooper*, 199 Fed. 576. I therefore answer your second question in the affirmative.

Accordingly, no answer to your third question is called for.

BOSTON ELEVATED RAILWAY COMPANY — EMPLOYEES —
PUBLIC SERVICE — PREFERENCE OF VETERANS AND
CITIZENS.

The service in which employees of the Boston Elevated Railway Company are engaged is not any branch of the public service of the Commonwealth.

Statutes containing provisions giving preference to veterans and to citizens of the Commonwealth with respect to their employment in the public service are not applicable to employment in the service of the Boston Elevated Railway Company.

To the
Governor and
Council.
1925
January 5.

You have requested my opinion as to questions of law raised in a letter from the Department Commander of the American Legion to the chairman of the Trustees of the Boston Elevated Railway Company, of which a copy is transmitted to me. The question presented by this letter seems to be "whether or not it is proper under any contract or agreement to retain non-citizens under seniority rights and discharge veterans and citizens."

Our statutes contain various provisions giving preference to veterans and to citizens of the Commonwealth with respect to their employment in the public service. See G. L., c. 31, §§ 19, 21-28; c. 149, § 26. *Lee v. Lynn*, 223 Mass. 109. There is no statute of which I am aware purporting to impose any restriction on the right of aliens to be employed in any other service; and such a statute, if enacted, would be of doubtful validity. *Truax v. Raich*, 239 U. S. 33. Cf. *Opinion of the Justices*, 207 Mass. 601.

The first question to be considered, therefore, is whether the service in which the employees of the Boston Elevated Railway Company are engaged is any branch of the public service.

The relation of the Commonwealth to the company and the powers and duties of the trustees are determined by Sp. St. 1918, c. 159, under which public control of the company was inaugurated. Regarding its scope and purpose the court said, in *Boston v. Treasurer and Receiver General*, 237 Mass. 403, 412:

Its general scope is indicated by its title, which is, "An Act to provide for the public operation of the Boston Elevated Railway Company." The accuracy of the title is confirmed by the substance of the act throughout. Its purpose is operation through public officers and not public ownership.

The following provisions of Sp. St. 1918, c. 159, relative to the powers and duties of the trustees and the nature of their office should be particularly referred to.

In section one it is provided that the trustees "shall not be considered public officers within the meaning of" St. 1909, c. 514, § 25, forbidding public service corporations to appoint or discharge employees at the request of public officers. It is also provided that "the provisions of section one of chapter seven of the Revised Laws (G. L., c. 12, § 3) shall not apply to the said board," those being provisions which require the Attorney-General to act for State departments, officers and commissions in matters relating to their official duties. Section 2 provides that the board of trustees "shall manage and operate the Boston Elevated Railway Company, hereinafter called the company, and the properties owned, leased or operated by it" for the period of public control; that the trustees, "for the purposes of this act, shall, except as is otherwise provided in this act, have and may exercise all the rights and powers of said company and its directors, and, upon behalf of said company, shall receive and disburse its income and funds"; and that "in the management and operation of the said company and of the properties owned, leased or operated by it, as authorized by this act, the trustees and their agents, servants and employees shall be deemed to be acting as agents of

the company and not of the commonwealth, and the company shall be liable for their acts and negligence in such management and operation to the same extent as if they were in the immediate employ of the company, but said trustees shall not be personally liable." Section 3 provides that "the trustees shall have authority to make contracts in the name and on behalf of, and to issue stocks, bonds and other evidences of indebtedness of, the company."

In view of these provisions, it is my opinion that the service in which the employees of the company are engaged is not any branch of the public service of the Commonwealth, and that the statutory provisions referred to above, giving preference to citizens and veterans in the public service, are not applicable. This is in conformity with an opinion given by me to the Speaker of the House under date of January 25, 1924. (VII Op. Atty. Gen. 331.)

TAXATION — EXEMPTION — PUBLIC CHARITY — THEATRE.

The words "literary, benevolent, charitable and scientific institutions," in G. L., c. 59, § 5, cl. 3rd, cover, in general, the institutions which are within the equity of St. 43 Eliz., c. 4.

They do not, however, include religious institutions, which are dealt with elsewhere in the statute.

They do include educational institutions, such as schools, libraries, museums and lecture foundations, so long as the educational purpose is not subordinate to a dominant non-charitable purpose.

A theatre, not run for profit but upon a permanent foundation for the advancement of dramatic art, is an educational institution within the scope of this doctrine.

The land owned by such an institution, having been purchased with a view to removing the *situs* of the institution thereto, is exempt from local taxation, irrespective of occupancy, until such removal, but not for more than two years after such purchase.

In connection with your duties under G. L., c. 58, § 1, you have asked my opinion "as to whether the Trustees of the Jewett Repertory Theatre Fund Inc. are taxable on any property which they may hold"; and more particularly upon certain real estate in the city of Boston upon which local taxes were assessed in the years 1923 and 1924.

The facts, as stated in your letters and their enclosures, relating to the corporation, its purposes and the manner of its holding of this land are recited below in discussing the various phases of the question.

The relevant portion of G. L., c. 59, § 5, respecting persons and property exempt from taxation is as follows: —

Third, Personal property of literary, benevolent, charitable and scientific institutions and of temperance societies incorporated in the commonwealth, the real estate owned and occupied by them or their officers for the purposes for which they are incorporated, and real estate purchased by them with the purpose of removal thereto, until such removal, but not for more than two years after such purchase, except as follows: —

(a) If any of the income or profits of the business of the institution or corporation is divided among the stockholders or members, or is used or appropriated for other than literary, educational, benevolent, charitable, scientific or religious purposes, its property shall not be exempt.

(b) A corporation coming within the foregoing description shall not be exempt for any year in which it wilfully omits to bring in to the assessors the list and statement required by section twenty-nine.

The exemption is thus made to turn upon the character of the corporation, upon the uses made of its income, and, in the case of land, upon the extent and nature of the occupancy of the premises for which exemption is sought. Wilful non-compliance with G. L., c. 59, § 29, respecting annual returns is made a bar to obtaining the exemption for the year in which such non-compliance occurs.

1. The Jewett Repertory Theatre Fund Inc. is a Massachusetts corporation; and there is no intimation of any wilful delinquency as to the bringing in of the required lists of its property. So far it meets the requirements for the exemption. No facts are given, however, as to the uses made of its income, if any.

2. Does it belong to the class of "literary, benevolent, charitable and scientific institutions" to which the statute refers? These terms have persisted in the exemption provisions ever since their appearance in R. S., c. 7, § 5, cl. 2.

In general they cover the cases of institutions which are within the provisions or "within the equity" of St. 43 Eliz., c. 4, "which is the foundation of our law on the subject of charities." *Mass. Society, etc., v. Boston*, 142 Mass. 24, 27; *Molly Varnum Chap. D. A. R. v. Lowell*, 204 Mass. 487, 493. Although they do not expressly include "educational institutions," their force has very many times been invoked in behalf of schools, academies and colleges. *Trustees of Wesleyan Academy v. Wilbraham*, 99 Mass. 509; *Cambridge v. County Commissioners*, 114 Mass. 337; *Mount Hermon Boys' School v. Gill*, 145 Mass. 139; *Williston Seminary v. County Commissioners*, 147 Mass. 427; *Amherst College v. Assessors of Amherst*, 173 Mass. 232; *Phillips Academy v. Andover*, 175 Mass. 118; *Harvard College v. Cambridge*, 175 Mass. 145; *Emerson v. Trustees of Milton Academy*, 185 Mass. 414; *Amherst College v. Assessors of Amherst*, 193 Mass. 168; *Watson v. Boston*, 209 Mass. 18; *Wheaton College v. Norton*, 232 Mass. 141; *Thayer Academy v. Assessors of Braintree*, 232 Mass. 402. Even where religious teaching is one of the corporate purposes of a school, if the "paramount and dominant purpose" is education it may be a literary, benevolent, charitable or scientific institution, and need not be held a "religious organization" (which is dealt with in G. L., c. 59, § 5, cls. 10th and 11th, and not in cl. 3rd; see *First Universalist Society in Salem v. Bradford*, 185 Mass. 310). *South Lancaster Academy v. Lancaster*, 242, Mass. 553. Further, most gifts for educational purposes are charitable, even though the means employed be other than organized schools. See *Jackson v. Phillips*, 14 Allen, 539, 552; *Richardson v. Essex Institute*, 208 Mass. 311, 318; Perry on Trusts, vol. 2, 6th ed., § 700. Thus exemption from taxation has been afforded, because in whole or in part of educational features, to a society for the prevention of cruelty to animals (*Mass. Society, etc., v. Boston*, 142 Mass. 24, 27-28); to a chapter of the Daughters of the American Revolution, incorporated for various broad purposes, historical and patriotic (*Molly Varnum*

Chap. D. A. R. v. Lowell, 204 Mass. 487); and to a Young Men's Christian Association (*Little v. Newburyport*, 210 Mass. 414). See *Salem Lyceum v. Salem*, 154 Mass. 15. Only where the general educational purposes were subordinate to some dominant non-charitable purpose have corporations having an educational aspect been held outside the scope of the exemption. *New England Theosophical Corporation v. Boston*, 172 Mass. 60; *Phi Beta Epsilon Corporation v. Boston*, 182 Mass. 457. Numerous cases not involving questions of taxation have held gifts charitable which furthered education through means other than organized schools; as, for example, gifts for libraries (*Drury v. Inhabitants of Natick*, 10 Allen, 169; *Bartlett, petr.*, 163 Mass. 509; *St. Paul's Church v. Attorney General*, 164 Mass. 188; *Minns v. Billings*, 183 Mass. 126); for maintaining a colonial house and its contents as a museum (*Richardson v. Essex Institute*, 208 Mass. 311; cf. *Molly Varnum Chap. D. A. R. v. Lowell*, *supra*); and for public lectures (*Lowell etc., Appellants*, 22 Pick. 215). In *Minns v. Billings*, *supra*, at page 131, one of the circumstances emphasized was that "the corporation owns many valuable works of art . . . the most important of which are now kept on exhibition at the museum of fine arts in Boston, where they are frequently exhibited to the public, free of charge." In *Thorp v. Lund*, 227 Mass. 474, 482, holding a gift for "the distribution of donations to the younger musicians, actors and actresses holding engagements with the National Stage of Bergen" to be a public charity, the following language occurs: —

The National Stage of Bergen is in a sense a national theatre of Norway. . . . It is an institution established directly for the inculcation of patriotism, for the cultivation of music and the drama, and in a broad sense for the promotion of popular education in those departments of the fine arts. The distribution of prizes among the meritorious youth who are pursuing these studies and cultivating their skill in these branches is a charity.

The Jewett Repertory Theatre Fund Inc. was incorporated under the provisions of R. L., c. 125, and acts in

amendment thereof and in addition thereto, for the following purposes: —

To enlighten and educate the public concerning the value of the Repertory Theatre as a vital factor toward the higher development of dramatic art and to establish a permanent playhouse in the city of Boston where the best plays of all times may be presented, where competent actors may be afforded an opportunity of appearing before the public under favorable conditions, and to encourage playwrights and actors in the best traditions of the dramatic profession.

These words show a careful avoidance of any reference to purposes of private advantage. The corporation has no capital stock, nor is there indicated any expectation of the application of income except towards the furtherance of the stated general purposes. The substance of these purposes is the promotion of dramatic art and the benefiting of the general public through the permanent maintenance of a theatre where may be given a more varied, better performed, and possibly less expensive range of dramatic productions than might perhaps be afforded the playgoing public under the ordinary circumstances of commercial management. Although such purposes are of necessity partly recreational, they are fundamentally educational in the broad sense of that word, and I am of the opinion that a corporation so purposed falls within the class of literary, benevolent, charitable and scientific institutions.

3. The next inquiry is whether the land in question comes within the particular words of the exemption relating to real estate. The facts are that the corporation was organized in March, 1920, that it has had various offices for the transacting of its business, that it bought the land in question July 25, 1922, that negotiations with architects and builders have been in progress since sometime in 1922, that a contract has been let for the construction of a building thereon, executed November 4, 1924, that actual construction was begun November 11, 1924, that the building is contracted to be completed on or before September 1, 1925. The contemplated structure consists of a theatre, an "assembly

hall," numerous accessory rooms and administrative offices. If built according to the present plans it cannot be said to be unadapted to the purposes of the corporation.

The types of real estate which are exempt are as follows:—

Real estate owned and occupied by them (the various kinds of corporations referred to above) or their officers for the purposes for which they are incorporated, and real estate purchased by them with the purpose of removal thereto, until such removal, but not for more than two years after such purchase.

The language of R. L., c. 12, § 5, cl. 3, was similar. This statute seems plainly to refer to two different classes of real estate: first, the real estate which is owned and occupied for corporate purposes; and second, real estate purchased with a view to removal, *i.e.*, real estate owned and to be occupied in the future. This second class is to be exempt for not more than two years after purchase. Thereafter actual occupancy is required. The history of the statute leads up through a steady development to this conclusion.

The provisions of G. S., c. 11, § 5, cl. 3, were as follows: —

Third, The personal property of literary, benevolent, charitable, and scientific institutions incorporated within this commonwealth, and the real estate belonging to such institutions, occupied by them or their officers for the purposes for which they were incorporated.

Under this statute the meaning of "occupied," with reference to land held merely for future use, was thrown into considerable doubt by a series of decisions.

In *New England Hospital v. Boston*, 113 Mass. 518, a charitable corporation had taken title to land on April 25, 1871, had employed an architect April 15, 1871, had commenced construction May 27, 1871, had prosecuted the construction diligently, and was held not subject to a tax assessed upon these premises May 1, 1871. In *Redemptorist Fathers v. Boston*, 129 Mass. 178, the court, in holding a corporation taxable on certain vacant land not serving any immediate corporate purpose but alleged to

be held for further building expansion, said "it should at least appear that it had begun to build," citing *New England Hospital v. Boston*, *supra*. In *Trinity Church v. Boston*, 118 Mass. 164, the premises of a religious society upon which a new house of worship to replace a former one destroyed by fire was in process of building were held not taxable by a majority of the court, following *New England Hospital v. Boston*. Wells, J., dissented, upon the ground that G. S., c. 11, § 5, cl. 3, under which that case arose, differed in terms from G. S., c. 11, § 5, cl. 7, relating to places of worship. In *Trinity Church v. Boston*, *supra*, this language, following a reference to *New England Hospital v. Boston*, *supra*, occurred: —

It is not necessary in this case to define at what stage in the erection of a building the property becomes a house of religious worship, or to say that land only may, under some circumstances, be exempt from taxation, although no building has been actually begun upon it.

The Legislature undertook to resolve this doubt by the passage of St. 1878, c. 214, which reads as follows: —

The real estate belonging to such institutions are as mentioned in the third division of section five of chapter eleven of the General Statutes, purchased with a view of removal thereto, shall not be exempt from taxation for a longer period than two years until such removal takes place.

After this act, "passed probably in consequence of the decision in *Trinity Church v. Boston*" (*Lynn Workingmen's Aid Association v. Lynn*, 136 Mass. 283, 285), the question whether land held with a view to removal was "occupied" or not was arbitrarily determined. Such land was "occupied" during a period of two years after purchase merely by force of the proposed future use. After the two years had passed the land was not "occupied," and so was not exempt, except when actually occupied, "not . . . in the general sense in which a corporation or individual may be said to occupy their real estate when it is not occupied by any one else, but in the sense in which an incorporated college,

academy, hospital, or like institution, occupies its college, academy, or hospital, and the lands and buildings connected therewith." *Lynn Workingmen's Aid Association v. Lynn*, *supra*, p. 285. Thus, after the two years were passed, the requirement of occupancy could no longer be satisfied by the mere progress in plans for construction such as formerly sufficed in *New England Hospital v. Boston*, *supra*.

The law was codified in P. S., c. 11, § 5, cl. 3, as follows: —

Real estate belonging to such institutions, occupied by them or their officers for the purposes for which they were incorporated; but such real estate, when purchased by such a corporation with a view to removal thereto, shall not, prior to such removal, be exempt for a longer period than two years.

In R. L., c. 12, § 5, cl. 3, came the change to the present form of the statute. Precisely the same result as formerly is now achieved, not by a requirement of occupancy and then a provision substantially defining what occupancy may consist of in the case of land purchased for future use, but rather by the creation of two classes, — of land "occupied" in the stricter sense, and of land held for not over two years after purchase with the view of going into occupancy (in the same stricter sense) thereof.

It would seem, however, that the two-year exemption is not extended to all land purchased with a view to future use, "removal" having received, in *Wheaton College v. Norton*, 232 Mass. 141, 147, the following more narrow definition: —

The words "purchased . . . with the purpose of removal thereto," naturally mean a change in the *situs* of the institution from one tract of land to another, and do not mean other land purchased for college purposes. *New England Hospital for Women & Children v. Boston*, 113 Mass. 518.

Applying this test to the Jewett Repertory Theatre Fund Inc., it appears that the premises in question are to be in substitution for the quarters in which the corporation has

previously carried on its business, and will constitute a wholly new "*situs* of the institution."

I answer your question, therefore, that, provided no such application of income to non-charitable purposes nor failure to bring in the required lists has occurred to evoke the application of subdivisions (a) and (b) of G. L., c. 59, § 5, quoted above, the Jewett Repertory Theatre Fund Inc. was exempt from local taxation upon its personal property and upon the particular real estate in question at the time that the 1923 and 1924 assessments were levied.

NOTARIES PUBLIC — JUSTICES OF THE PEACE — APPOINTMENT — REMOVAL.

Notaries public and justices of the peace are appointed and may be removed by the Governor, with the consent of the Council.

Apart from any legal limitations upon eligibility, all matters pertaining to the appointment and removal of notaries and justices, as, for example, the number of commissions to be issued, the personal qualifications required for appointment, or the grounds for removal, are entrusted to the discretion of the Governor and Council.

To the
Governor and
Council.
1925
January 20.

In response to your request, I submit a brief survey of the law relating to the appointment and removal of notaries public and justices of the peace.

In the original Constitution of the Commonwealth, justices of the peace were to be nominated and appointed by the Governor, by and with the advice and consent of the Council, being judicial officers (*Opinion of the Justices*, 107 Mass. 604), within the meaning of Mass. Const., pt. 2nd, c. II, § I, art. IX, which reads as follows: —

All judicial officers, the attorney-general, the solicitor-general, all sheriffs, coroners, and registers of probate, shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment.

Notaries public, on the other hand, were to be elected by the Legislature. Mass. Const., pt. 2nd, c. II, § IV, art. I, read, in part, as follows: —

The secretary, treasurer and receiver-general, and the commissary-general, notaries public, and naval officers, shall be chosen annually, by joint ballot of the senators and representatives in one room.

By Mass. Const. Amend. IV, however, notaries were also brought within the appointing power of the Governor and Council: —

Notaries public shall be appointed by the governor in the same manner as judicial officers are appointed, and shall hold their offices during seven years, unless sooner removed by the governor, with the consent of the council, upon the address of both houses of the legislature.

As to the removal of these officers, it is to be observed that Mass. Const. Amend. IV, just quoted, rendered notaries removable by the Governor, with the consent of the Council, upon the address of both houses of the Legislature. Justices of the peace, as judicial officers, were similarly removable under Mass. Const., pt. 2nd, c. III, art. I, which read as follows: —

The tenure, that all commissioned officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned, and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution: provided nevertheless, the governor, with consent of the council, may remove them upon the address of both houses of the legislature.

The legislative address as a prerequisite to removal was dispensed with by Mass. Const. Amend. XXXVII, which reads as follows: —

The governor, with the consent of the council, may remove justices of the peace and notaries public.

Although the duties of these officers are the subject of numerous statutory provisions, there is no statute relating to the removal, and the only statute relating to appointment is as follows (G. L., c. 222, § 1): —

Justices of the peace and notaries public shall be appointed, and their commissions shall be issued, for the commonwealth, and they shall

have jurisdiction throughout the commonwealth except as provided in section thirty-six of chapter two hundred and eighteen.

Prior to Mass. Const. Amend. LVII, women could not be notaries public (*Opinion of the Justices*, 150 Mass. 586; *Opinion of the Justices*, 165 Mass. 599), and could not, before the adoption of the Nineteenth Amendment to the Constitution of the United States, be justices of the peace (*Opinion of the Justices*, 107 Mass. 604; *Opinion of the Justices*, 240 Mass. 601; VI Op. Atty. Gen. 247, VI Op. Atty. Gen. 527). Although the restriction just mentioned no longer exists, there may be other limitations upon eligibility to appointment now in force. For example, although leaving the Commonwealth does not of its own force vacate the office (VII Op. Atty. Gen. 126) a person not domiciled within the Commonwealth is not eligible to appointment (VII Op. Atty. Gen. 107).

It is my opinion that, except for limitations of the type mentioned in the preceding paragraph, all questions relating to the number of justices of the peace and notaries public which it may be thought desirable to have, or relating to the personal qualifications for appointment to these offices, or relating to the reasons for which such officers once appointed should be removed, are for the determination of the Governor and Council, in the exercise of their sound discretion. It is assumed, of course, that this discretion will not be arbitrarily exercised, but the limits within which it may with propriety be exercised will be very broad. For example, new appointments might be refused or officers already appointed might even be removed, upon the ground that there was a greater number of such commissions already outstanding than was thought desirable. Similarly, it will be proper to inquire with care into the personal qualifications of applicants or into the reasons for which they seek appointment. Particular cases may perhaps furnish occasion for the consideration of other circumstances in connection with appointment or removal.

SUBMISSION TO VOTERS OF A QUESTION OF PUBLIC POLICY —
MAJORITY OF ALL THE VOTES CAST.

G. L., c. 53, § 22, providing that no vote on the submission of a question of public policy shall be regarded as an instruction unless the question submitted receives a majority of all the votes cast at that election, means a majority of all the ballots cast, and not a majority of the votes cast upon the question submitted.

You request my opinion upon a question of law as to the interpretation of G. L., c. 53, § 22, which has arisen in connection with your official duties in examining and certifying, under G. L., c. 54, the result of the votes on a certain question.

To the
Governor and
Council.
1925
January 22.

G. L., c. 53, §§ 18 to 22, inclusive, provide for the submission of questions of public policy in senatorial and representative districts, upon application. Section 22 provides that no vote thereon shall be regarded as an instruction *unless the question submitted receives a majority of all the votes cast at that election.*

It appears that at the election last November there appeared upon the ballot in certain senatorial and representative districts a public policy question having to do with the matter of non-contributory old age pensions. The question now to be determined is as to whether or not the majority referred to in section 22 is a majority of all the ballots cast at the last election in a given senatorial or representative district, or a majority of all the votes cast on the public policy question as to non-contributory old age pensions.

It is the fundamental rule in statutory construction that the intention of the Legislature, as shown by the language used, the object intended to be accomplished and other circumstances, should be determined and carried into effect. In other words, the statute itself furnishes the best means for its own exposition. *Moore v. Stoddard*, 206 Mass. 395, 399.

But where, after a consideration of the language of the entire statute, there remains a doubt as to its meaning, reference may be had to extrinsic matters. Its meaning

may frequently be ascertained by resort to the history of its passage through the Legislature. *Browne v. Turner*, 174 Mass. 150. For the purpose of interpreting the legislative will, resort may be had to the history of the statute as found in the journals of the two legislative bodies, and also to the original bill with the amendments noted thereon.

Such an examination of the legislative history of the law in question has been made in this case. Article XIX of the Bill of Rights of the Constitution of this Commonwealth provides that the people have a right to give instructions to their representatives, and, pursuant to this, the Legislature, in 1913, enacted a law providing for the submission to the voters on official ballots of questions of public policy. This law is now found in G. L., c. 53, §§ 18 to 22, inclusive, referred to above. The records show that at the beginning of the legislative session in 1913 the Massachusetts State Branch of the American Federation of Labor filed a bill providing for the submission to the voters on official ballots of questions of public policy. This bill was printed as House Bill No. 366. As filed, the section in question read as follows:—

No vote under the provisions of this act shall be regarded as an instruction under article nineteen of the bill of rights of the constitution of the commonwealth, unless it receives a majority of all the ballots cast at that election.

When the bill was passed upon by the House committee on bills in the third reading that committee recommended an amendment of the section by substituting the following language:—

No vote under the provisions of this act shall be regarded as an instruction under article nineteen of the bill of rights of the constitution of the commonwealth, unless the question submitted receives a majority of all the votes cast *thereon* at that election.

On March 17th the amendment was accepted and the bill was passed to be engrossed and sent up to the Senate for concurrence.

On June 10th the bill was passed to be engrossed in the Senate in concurrence, but with an amendment in the section now being considered by striking out the word "*thereon*." The bill was then sent down to the House for concurrence on this amendment. On June 11th the House refused to concur. On June 12th the Senate insisted upon its stand, and later that same day the House receded from its position and concurred with the Senate, and the bill went forward with the word "*thereon*" stricken out, and finally, on June 16th, was signed by the Governor and became law.

This examination of the history and passage of the act through the Legislature makes manifest the intention of the Legislature, namely, that the majority required by G. L., c. 53, § 22 (St. 1913, c. 819, § 4), means, in the case before us, a majority of all the ballots cast in a given senatorial or representative district, and not a majority of the votes cast on the single matter, to wit, the public policy question of non-contributory old age pensions.

NOTARIES PUBLIC — JUSTICES OF THE PEACE — POWERS AND DUTIES.

The powers and duties of notaries public and justices of the peace are collected and summarized.

You have requested my opinion as to the general powers and duties of notaries public and justices of the peace.

The powers and duties of justices of the peace may conveniently be listed in the following groups:

1. *Taking of Oaths and Acknowledgments*. — By G. L., c. 222, § 1, justices of the peace are authorized, unless otherwise expressly provided, to administer oaths or affirmations in all cases in which an oath or affirmation is required, and to take acknowledgment of deeds and other instruments. By G. L., c. 4, § 6, cl. 6th, it is further established as a rule of construction that "wherever any writing is required to

To the
Governor and
Council.
1925
February 9.

be sworn to or acknowledged, such oath or acknowledgment may be taken before a justice of the peace." There are in addition many provisions in the statutes for the taking of oaths or acknowledgments in particular cases. Thus, of the acknowledgment of deeds, G. L., c. 183, § 30; of arbitration agreements, G. L., c. 251, § 2; of assignments of corporate shares sold for non-payment of assessments, G. L., c. 158, § 31; of the records of notaries public and bank officers who participate in opening a safe deposit box for non-payment of rent, G. L., c. 158, § 17; of a certificate of witnesses to an entry to foreclose a mortgage, G. L., c. 244, § 2; or of the certificate of a limited partnership, G. L., c. 109, § 5.

Similar provisions relate to the administering of oaths to the clerk of a religious society (G. L., c. 67, § 15); to town officers (G. L., c. 41, §§ 16, 20, 29, 107); to railroad, street railway and steamboat police (G. L., c. 159, § 91); or to persons who are to determine disputed claims relating to impounded animals (G. L., c. 49, §§ 35 and 36). Undoubtedly an elaborate search of the statutes and of regulations made pursuant to statutory authority would disclose numerous other particular provisions relative to the taking of oaths and acknowledgments, which are also covered by the general provisions first noted above. It is perhaps common knowledge, for example, that both State and Federal income tax returns are required to be sworn to.

2. *Judicial Powers and Duties.* — The appointment by the Governor, with the advice and consent of the Council, of justices of the peace to be trial justices in certain named towns, and the special powers of such justices, are provided for in G. L., c. 219. By section 1 of that chapter all justices of the peace not so designated and commissioned are prohibited from the exercise of judicial power and from the receiving of complaints or the issuing of warrants, with certain exceptions which will be mentioned below.

A justice of the peace who is a clerk or assistant clerk of a district court is given by G. L., c. 218, § 35, certain

powers relative to the receiving of complaints and issuing of warrants and summonses, and under G. L., c. 218, § 36 (amended by St. 1924, c. 58), a justice of the peace residing in a town within the district of a district court, and in which town the clerk of such court does not reside, may be designated and commissioned to exercise similar powers, and to take bail in criminal cases arising within the judicial district. Such designated justices may also issue summonses and other processes for witnesses in criminal cases, and processes for parties and witnesses in certain juvenile cases. G. L., c. 218, § 37. They are given general powers as to search warrants by G. L., c. 176, § 1, and there are also numerous particular provisions respecting issuance of warrants, such as, for example, to search for certain drugs (G. L., c. 94, § 214); to abate certain nuisances under the direction of a board of health (G. L., c. 111, § 131); to permit the examination of gas meters (G. L., c. 164, § 116); for the removal of persons affected with contagious diseases, etc. (G. L., c. 111, § 96); to secure infected articles, etc. (G. L., c. 111, § 99); or to impress places for the storage thereof (G. L., c. 111, § 100).

A board of three justices may sit to determine the amount due for redemption of land taken upon execution (G. L., c. 236, § 34). Under certain circumstances any justice of the peace may issue a writ of habeas corpus (G. L., c. 248, § 2). Any justice may issue summonses for witnesses (G. L., c. 233, § 1); and in any case where the justice is authorized to examine witnesses, he may, in case of failure to attend, issue warrants to compel attendance and to answer for contempt (G. L., c. 233, §§ 5, 6). Any justice may take depositions in causes pending within or without the Commonwealth (G. L., c. 233, §§ 26, 45). Two justices may sit to take depositions to perpetuate testimony (G. L., c. 233, § 46).

3. *As Peace Officers.* — By G. L., c. 220, § 3, justices of the peace are given authority to suppress and make arrests in cases of affrays, riots, assaults and batteries and may

command the assistance of other persons in so doing. In G. L., c. 269, § 1 *et seq.*, this power is expressly extended to cases where twelve or more persons, being armed, or thirty or more persons, whether armed or not, are “unlawfully, riotously or tumultuously assembled in a city or town”; and by G. L., c. 269, § 3, a fine of not over \$300 may be imposed upon an officer who neglects his duty in such cases. It is to be noted that these powers are carefully limited to certain extraordinary cases, and furnish no justification for officiousness in cases of ordinary confusion or peaceful assemblage, as, for example, may arise following an accident upon the highway.

4. *Relative to Meetings of Corporations, Associations, etc.* — In certain cases justices of the peace are given powers to call — and sometimes to preside over — town meetings (G. L., c. 39, §§ 11, 12 and 14); stockholders’ meetings (G. L., c. 155, § 15; G. L., c. 158, § 36); meetings for the organization of fire districts (G. L., c. 48, § 62); meetings of private way or bridge proprietors (G. L., c. 84, § 12); of religious societies, etc. (G. L., c. 67, §§ 12, 22, 23, 29 and 42); of proprietors of wharves, etc. (G. L., c. 179, § 1); or of proprietors of general fields (G. L., c. 179, § 19).

5. *Certain Miscellaneous Powers and Duties.* — Under G. L., c. 207, §§ 38 and 39, certain justices of the peace are or may be authorized to solemnize marriages. The nomination of a guardian of a minor may be made before a justice of the peace, G. L., c. 201, § 2. Justices may inspect druggists’ records and liquor sales, G. L., c. 138, § 32 (amended by St. 1923, c. 233, § 5). They may require the exhibition of hawkers’ and pedlers’ licenses, G. L., c. 101, § 27.

Powers and duties of notaries public may be classified, in comparison with those of justices of the peace, as follows:—

1. *Taking of Oaths and Acknowledgments.* — The general provisions relative to this subject (G. L., c. 4, § 6, cl. 6th, and G. L., c. 222, § 1) give to notaries the same powers as are given to justices to administer oaths or affirmations

and take acknowledgments of deeds and other writings; and the same is true of G. L., c. 183, § 30, relative to the acknowledgment of deeds, etc. It will perhaps not be profitable to endeavor to collect here the statutes referring to the taking of oaths in particular cases. While undoubtedly there are some instances where oaths can only be administered by a justice or by a notary, respectively, because of the way in which the law has developed, to a large extent the field is the same as to both officers. One instance where apparently only a notary can take the required affidavit is G. L., c. 233, § 77, relating to copies of bank records for use in evidence.

2. *Judicial Powers and Duties.* — The notary is not in any sense a judicial officer. Recently, however, by St. 1923, c. 263, the power to issue subpoenas for witnesses has been conferred upon notaries.

3. *As Peace Officers.* — The notary has no such duties as pertain to the justice of the peace in this respect.

4. *Relative to Meetings of Corporations, Associations, etc.* — Neither do the various provisions mentioned above relative to the calling of meetings of corporations, etc., apply to notaries.

5. *Miscellaneous Powers and Duties.* — Nominations of guardians of minors may be made before a notary as well as before a justice. G. L., c. 201, § 2. Certain notices to non-resident owners of dangerous structures may be served by a notary, G. L., c. 143, § 11. The notary has certain duties with relation to the opening of safe deposit boxes for non-payment of rent, G. L., c. 158, § 17.

6. *Protest of Commercial Paper.* — This important function, in which justices have no part, is governed partly by statute and partly by the common law. G. L., c. 107, § 176, confers upon notaries the power to make protests; and there are numerous other sections relating thereto. Keen's Manual for Notaries and Justices (1903), c. 3, sets out at length many features of these duties which cannot well be stated in a small space. Reference is made to this

manual with the caution necessarily arising in view of the possibility of changes or developments since the date of its publication.

7. *Marine Protests*. — Another power which does not pertain to justices of the peace relates to the noting and extending of marine protests. See Keen's Manual for Notaries and Justices, c. 4. Such a protest "has been described as a declaration in writing, drawn up and attested by a notary public, by the master of a merchant ship, his mate and part of the ship's crew, after a voyage in which the ship has suffered in her hull, rigging or cargo, to show that such damage did not happen through any neglect or misconduct on their part." Keen's Manual, p. 90.

Summarizing from the above, it will be seen that both notaries and justices participate at large in the power to take oaths and acknowledgments, and that from this point on their duties in general diverge, the justice of the peace being a minor judicial officer with very limited and circumscribed powers, and the notary public being an administrative or executive officer charged largely with duties pertaining to commercial transactions. Neither officer has any broad or general class of powers and duties of which the boundaries are not ascertainable with fair ease or which should reasonably furnish any warrant for meddlesomeness *colore officii* in the private affairs of others.

COMMISSIONERS FOR MASSACHUSETTS IN OTHER STATES AND FOREIGN COUNTRIES.

The duties of commissioners for Massachusetts in other States and foreign countries may be performed by persons other than the commissioners, and their appointment is not absolutely necessary.

To the
Governor,
1925
February 10.

You have referred to me two petitions for appointment as commissioner for Massachusetts in a foreign country, one from Ireland and one from a correspondent in Washington, who, however, desires the commission for Mexico. Your letter states in part: —

Without regard to the qualifications of the applicants, your opinion is requested as to whether there is at present any general need for the appointment of such commissioners which cannot be otherwise supplied without inconvenience or hardship to the public.

G. L., c. 222, defines the powers of a commissioner. Section 6 of said chapter reads as follows: —

A commissioner may, in his state, territory, district, dependency or country, administer oaths and take depositions, affidavits and acknowledgments of deeds and other instruments, to be used or recorded in this commonwealth, and the proof of such deeds, if the grantor refuses to acknowledge the same, all of which shall be certified by him under his official seal.

G. L., c. 183, § 30, provides: —

The acknowledgment of a deed or other written instrument required to be acknowledged shall be by one or more of the grantors or by the attorney executing it. The officer before whom the acknowledgment is made shall endorse upon or annex to the instrument a certificate thereof. Such acknowledgment may be made —

(c) If without the United States or any dependency thereof, before a justice of the peace, notary, magistrate or commissioner as above provided, or before an ambassador, minister, consul, vice consul, charge d'affairs or consular officer or agent of the United States accredited to the country where the acknowledgment is made; if made before an ambassador or other official of the United States, it shall be certified by him under his seal of office.

So far as the acknowledgment of deeds and other instruments requiring acknowledgment is concerned, there are a number of others besides commissioners who may perform that service.

G. L., c. 233, § 41, reads as follows: —

The deposition of a person without the commonwealth may be taken under a commission issued to one or more competent persons in another state or country by the court in which the cause is pending, or it may be taken before a commissioner appointed by the governor for that purpose,

and in either case the deposition may be used in the same manner and subject to the same conditions and objections as if it had been taken in the commonwealth.

In order to take testimony outside the Commonwealth a commissioner appointed by this State is not necessary, as it is apparent that the court may direct this commission to any competent person.

Therefore, it does not appear to be necessary to appoint a commissioner in any State or foreign country in order that deeds or other instruments may be properly acknowledged or testimony taken. No information has come to this department that there is any general need for the appointment of such commissioners at Cavan, Ireland, or Mexico City, Mexico.

ELECTION LAWS — RETURNS OF CANDIDATES.

Where nothing has been "contributed, expended or promised" for political expenses by a candidate for election, a statement to that effect in his return must contain those or synonymous terms.

To the
Secretary.
1925
February 10.

You request to be advised as to the construction of that portion of G. L., c. 55, § 16, which relates to statements required to be filed with you by candidates for public office, and you refer to that part of section 16 which requires a candidate to file with you, "if nothing has been contributed, expended or promised by him, a statement to that effect."

You ask, first, whether your department may, in such a statement, accept the phrase "nothing contributed, expended or promised," and no other. You will note that the section above referred to uses, not only the foregoing words, but also the words "a statement to that effect." I advise you, therefore, that, while it is not strictly necessary for a candidate to use those precise words in making his return, he must use terms that are synonymous.

You also ask whether such statements as "nothing paid or promised" and "nothing paid, nothing promised" can be accepted as a sufficient return. I advise you that a

return in that form has in it nothing that is synonymous with "contribute." Such a return does not disclose whether a candidate contributed or not, and is, therefore, insufficient. I am of the opinion that the word "paid" may be accepted as synonymous with "expended."

EDUCATION — TEACHERS — STATE AID.

Towns are not entitled to reimbursement, under G. L., c. 70, § 1, for salaries paid teachers, except as to salaries paid only for teaching and for teaching subjects authorized by G. L., c. 71, § 1.

You ask my opinion as to whether certain persons may be regarded as "teachers" for the purpose of determining the amounts to be paid as State aid to towns, under G. L., c. 70, § 1, as amended.

To the Com-
missioner of
Education.
1925
February 10.

G. L., c. 70, § 1, provides for part reimbursement to towns "for salaries paid to teachers, supervisors, principals, assistant superintendents and superintendents for services in the public day schools. . . ."

The persons specified by you are as follows: —

1. Nurses employed under G. L., c. 71, § 53, but who give some time to instructing classes in "home nursing" and give all children instruction in hygiene.

2. In high schools, — librarians, who give some instruction to pupils in the use of books and other reference materials.

3. In high schools, — deans of girls, who give full or part time to matters of guidance and discipline of high school girls.

4. Physical directors employed as teachers of physical education to give instruction in "indoor and outdoor games and athletic exercises," this instruction being required by G. L., c. 71, § 1, as amended by St. 1921, c. 360.

5. Coaches of baseball, basketball and football.

6. "Teacher-clerks" — persons who do clerical work or administrative work for principals and teach part time or substitute in place of teachers who may be absent.

It is provided by G. L., c. 71, § 1 (St. 1921, c. 360), that certain specified subjects shall be taught and that such

other subjects may be taught as the school committee considers expedient.

In the first place, then, no one should be considered as a "teacher" within G. L., c. 70, § 1, who does not teach a subject which is specified in G. L., c. 71, § 1, or which the school committee of the town in question, acting under G. L., c. 71, § 1, has deemed it expedient to make a subject to be taught.

In the second place, the provision contained in G. L., c. 70, § 1, is for part reimbursement for "salaries paid to teachers." A town would therefore not be entitled to reimbursement for any payments unless such payment constituted "salary," and unless, also, such salary was paid for teaching and not wholly or in part for something else.

Inasmuch as the answers to the specific questions which you ask may depend upon facts which I have not before me, I prefer not to attempt to answer them; but I have stated the rules which I think should govern, and the application of these rules to the facts, when ascertained, will probably not be difficult. Very likely in applying the rules to the facts it will be found that G. L., c. 70, § 1, covers payments to the persons referred to in questions numbered 3, 4 and 5, and not to the persons described in questions numbered 1, 2 and 6.

CONSTITUTIONAL LAW — OPINIONS OF THE JUSTICES.

The Governor and Council are authorized by the Constitution to require the opinions of the justices of the Supreme Judicial Court only upon matters then pending before the Governor and Council and in relation to the performance of their official duties.

To the
Governor.
1925
February 14.

You ask my advice concerning a communication to you suggesting that the Governor and Council require the opinion of the justices of the Supreme Judicial Court on the question whether the Federal statute commonly called the "Maternity Act" is constitutional.

Mass. Const., c. III, art. II, provides: —

Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices . . . upon important questions of law, and upon solemn occasions.

Unless there is both an important question of law and a solemn occasion such an opinion cannot be required. The words "upon solemn occasions" are defined in *Opinion of the Justices*, 126 Mass. 557, 566, as meaning "when such questions of law are necessary to be determined by the body making the inquiry, in the exercise of the legislative or executive power intrusted to it by the Constitution and laws of the Commonwealth." It was said in *Opinion of the Justices*, 122 Mass. 600, 601, 602, that the object of this constitutional provision was "to enable the Senate, the House of Representatives, or the Governor and Council, to obtain the advice of the justices upon any important question of law which the body making the inquiry has occasion to consider in the exercise of the legislative or executive powers intrusted to them respectively." The inquiry by either the legislative or the executive branch of the government must relate to the performance of official duties in regard to a matter then pending before it. *Opinion of the Justices*, 148 Mass. 623, 626; 186 Mass. 603, 608; 190 Mass. 611, 612; 208 Mass. 614; 211 Mass. 630; 217 Mass. 607, 611-613. In *Opinion of the Justices*, 214 Mass. 602, the justices declined to answer a question propounded by the Governor regarding the constitutionality of a bill then actually before him for his approval.

It does not appear that the matter to which the communication relates is in any way now pending before the Governor and Council. It does not appear that there is even any pending or proposed legislation with respect to it. I must advise you, therefore, that, in my opinion, the Governor and Council at the present time have no right to require the opinion of the justices of the Supreme Judicial Court upon the constitutionality of the Federal Maternity Act.

CONSTITUTIONAL LAW — EXEMPTION OF VETERAN ORGANIZATIONS FROM LICENSE FEES.

A statute exempting veteran organizations from paying a fee for licenses to keep billiard, pool or sippio tables or bowling alleys, while requiring a license fee of other keepers, would be unconstitutional because of its discrimination in favor of a certain class of citizens.

To the
Governor.
1925
February 18.

I acknowledge receipt of your communication wherein you request me to consider House Bill No. 1016, entitled "An Act exempting certain veteran organizations from license fees for keeping billiard, pool or sippio tables or bowling alleys."

This bill seeks to change existing law by exempting incorporated organizations of veterans of any war in which the United States has been engaged from paying a fee for licenses to keep billiard, pool or sippio tables or bowling alleys if and so long as said tables or bowling alleys are used exclusively by members of said organizations and their bona fide guests. The bill provides that all other keepers of billiard, pool or sippio tables and bowling alleys and other undertakings therein mentioned shall pay a license fee of not less than two dollars for each license.

The case of *Commonwealth v. Hana*, 195 Mass. 262, 266, 267, shows clearly that the proposed bill is unconstitutional. In that case a statute for the licensing of hawkers and pedlers, which exempted from the payment of a license fee residents of a city or town who paid taxes there on their stock in trade and were qualified to vote, persons seventy years of age or upwards, and former soldiers and sailors resident in the Commonwealth, was held to be unconstitutional. In so holding the court said: —

Even before the adoption of the Fourteenth Amendment it was a settled principle of constitutional law that statutes in regard to the transaction of business must operate equally upon all citizens who desire to engage in the business, and that there shall be no arbitrary discrimination between different classes of citizens. Under the Fourteenth Amendment, all persons are entitled to the equal protection of the laws. In several States such a discrimination in the granting of licenses in favor of soldiers

and sailors has come before the courts, and in all of them, so far as we are aware, the provision has been held unconstitutional. *State v. Shedroi*, 75 Vt. 277. *State v. Garbroski*, 111 Iowa, 496. *State v. Whitcom*, 122 Wis. 110. See also *In re Keymer*, 148 N. Y. 219; *Brown v. Russell*, 166 Mass. 14.

These cases and others show that a discrimination, founded on the residence of the applicant for a license or the amount of tax paid by him, cannot be sustained under the constitution. . . . We see no justifiable ground, under the Constitution, for a discrimination in favor of residents of a city or town who pay taxes there on their stock in trade, and who are qualified to vote there, nor of those who are seventy years of age or upwards. As the discrimination in favor of former soldiers and sailors was not referred to in argument, it is unnecessary to pass upon it; but as we have already seen, a similar discrimination has been held unconstitutional in other States.

This opinion has since been cited on several occasions. It has never been overruled or modified. It is, in my opinion, a controlling authority to show that the discrimination which the bill makes in favor of a certain class of citizens is one which is forbidden by the Fourteenth Amendment of the Constitution of the United States, and that the bill, if enacted, would be unconstitutional.

SURPLUS BONUS FUNDS RETURNED TO CITIES AND TOWNS — USE FOR A LIBRARY BUILDING.

A town cannot legally vote to hold the surplus bonus funds received under St. 1924, c. 480, as a fund for the erection of a library building, under G. L., c. 44, § 8, par. (7), in the absence of any evidence that said library building is intended as a memorial to soldiers, sailors and marines.

You request my opinion as to whether or not G. L., c. 44, § 8, par. (7), makes it legal for a town to vote to hold the surplus bonus as a fund for the erection of a library building.

St. 1924, c. 480, provides for the return to the cities and towns of certain surplus funds collected to provide suitable recognition of those residents of Massachusetts who served in the army and navy of the United States during the war with Germany. This act expressly provides that "any

To the Com-
missioner of
Education.
1925
February 24.

sum received by a city or town on account of such payment shall be held as a special fund to be appropriated only for the purpose of paying indebtedness or for purposes for which the city or town may borrow money as specified in sections seven and eight of chapter forty-four of the General Laws."

G. L., c. 44, § 8, provides: —

Cities and towns may incur debt, outside the limit of indebtedness prescribed in section ten, for the following purposes and payable within the periods hereinafter specified:

.

(7) For acquiring land or constructing buildings or other structures, including the cost of original equipment, as memorials to soldiers, sailors and marines, twenty years; but the indebtedness so incurred shall not exceed one half of one per cent of the last preceding assessed valuation of the city or town.

It is to be noted that this paragraph applies only to "memorials to soldiers, sailors and marines." Accordingly, in the absence of any evidence that the library building in question is intended as a memorial to soldiers, sailors and marines, it is my opinion that it would be illegal for a town to vote to hold such surplus bonus as a fund for the erection of a library building under paragraph (7), *supra*.

Inasmuch as your inquiry is limited to this paragraph it is unnecessary for me to consider whether or not such fund might be used for the erection of a library building under any other paragraph of G. L., c. 44, §§ 7 and 8.

VEHICLE WITH ITS LOAD WEIGHING MORE THAN FOURTEEN
TONS — PERMIT TO TRAVEL ON A PUBLIC WAY —
MAXIMUM LOAD — CONSTRUCTION OF STATUTES.

A permit is required in each instance for a vehicle, which with its load weighs more than fourteen tons, to travel on a public way.

The permit need not, but may, specify the ways over which such vehicle shall travel.

The Division of Highways may, by rule, establish a maximum weight of load at less than fourteen tons but not at more than fourteen tons.

Mere verbal changes in the revision of a statute do not alter its meaning.

The meaning of words in a statute must be determined from the context, the general intention of the Legislature and the purpose to be accomplished.

The construction placed upon a statute through many years by the administrative officers may be taken into consideration in construing the act.

You request my opinion on the following questions: —

To the Com-
missioner of
Public Works.
1925
February 26.

(a) Can a continuing permit to travel on any public way be granted to a vehicle which with its load weighs more than fourteen tons?

(b) Should the vehicle have a permit for each load which with the weight of the vehicle weighs more than fourteen tons?

(c) Should the permit specify the ways over which a vehicle which with its load weighs more than fourteen tons shall travel?

G. L., c. 85, § 30, as amended by St. 1922, c. 526, provides, in part: —

. . . nor shall any vehicle travel or object be moved on any public way which with its load weighs more than fourteen tons, without a permit from the board or officer having charge of such way. . . . Such permit may limit the time within which it shall be in force and the ways which may be used and may contain any provisions or conditions necessary for the protection of such ways from injury.

That act was formerly St. 1913, c. 803, §§ 1 and 3, and as then enacted provided that no such vehicle or object should be moved over a highway "without *first* obtaining" a permit. The word "first" was retained in the amendments of 1917 and 1918 (see Gen. St. 1917, c. 344, pt. 5, § 39, and Gen. St. 1918, c. 116, § 1) but was omitted in the General Laws. It is well settled, however, that mere verbal changes in the revision of a statute do not alter its meaning, and that the

Legislature will not be presumed to have intended to alter the law unless the language plainly requires that construction. *Commonwealth v. New York Central & Hudson River R.R. Co.*, 206 Mass. 417, 419; *Great Barrington v. Gibbons*, 199 Mass. 527, 529; *Tilton v. Tilton*, 196 Mass. 562, 564; *Savage v. Shaw*, 195 Mass. 571; *Electric Welding Co. v. Prince*, 195 Mass. 242, 259. The language of G. L., c. 85, § 30, does not require a construction that the Legislature intended to alter the law, and I am therefore of the opinion that the words "without a permit," in G. L., c. 85, § 30, should be construed as if the language were "without first obtaining a permit."

The meaning of the words "without a permit" or "without first obtaining a permit" and "such permit may limit the time within which it shall be in force" must be determined from the context, the general intention of the Legislature and the purpose to be accomplished. *Commonwealth v. Nickerson*, 236 Mass. 281, 290; *Hammond v. Hyde Park*, 195 Mass. 29, 30; *Chapin v. Lowell*, 194 Mass. 486, 488; *Toupin v. Peabody*, 162 Mass. 473, 476; *Sweetser v. Emerson*, 236 Fed. 161, 162.

The purpose of the act was manifestly to protect the highways against vehicles or objects which with their loads weighed more than fourteen tons. The Legislature, however, recognized that it would be necessary at times to move over the highways objects weighing more than fourteen tons, which could not be taken apart, and authorized the issuing of permits to move such loads. In each case, however, the problem for the board or officer granting such permits is to determine whether such a permit is necessary. This clearly involves a consideration of the facts in each case, and is not consistent with a suggestion that continuing permits may be granted generally for excessive loads for a period of time. The phrase "without first obtaining a permit" indicates that a permit is required for each specific load and that a general or continuing permit may not be given. Furthermore, the board authorized to issue permits

has since the act was first enacted in 1913 construed the statute as requiring a permit for each specific load, and has regarded itself as without power to issue general or continuing permits. The construction placed upon the statute through many years by those charged with the enforcement of the law may be taken into consideration in construing the act. *Tyler v. Treasurer and Receiver General*, 226 Mass. 306, 310; *Burrage v. County of Bristol*, 210 Mass. 299, 301.

In my opinion, therefore, a permit is required for each load and I accordingly answer question (a) in the negative and question (b) in the affirmative. With respect to question (c), the statute does not require that the permit specify the ways over which the vehicle shall travel, but the board or officer granting such permit may, in his discretion, so specify.

You further request my opinion upon the following questions:—

(a) Under St. 1924, c. 457, has the Division of Highways authority to establish a maximum weight of load greater or less than that fixed by G. L., c. 85, § 30?

(b) Has said Division authority to establish by rule the condition that a permit may be granted by the Division or by the authorities having charge of public ways to a vehicle to carry a load on a specified date over specified ways that weighs more than the limit prescribed by the rule for the maximum weight of the vehicle and load?

(c) Will these rules have precedence over the provision regulating maximum weight of loads and issuing of permits for heavier loads under G. L., c. 85, § 30?

This act provides, in part:—

The division after a public hearing may make, and may alter, rescind or add to, rules and regulations for the reasonable and proper control and regulation of the transportation by motor vehicle of personal property over the ways of this commonwealth, except ways under the control of the metropolitan district commission. Said rules and regulations shall cover, among other matters which the division may deem necessary or desirable, . . . the establishment of the maximum weight of loads

per commercial motor vehicle. . . . Said rules and regulations and any changes therein shall be subject to approval, and shall take effect, in the manner provided by section six of chapter sixteen.

The act makes no specific reference to G. L., c. 85, § 30, and is not inconsistent with it. It therefore does not, either specifically or by implication, repeal the latter statute. Both being in full force and effect, St. 1924, c. 457, must be read in the light of G. L., c. 85, § 30, and must be so construed as to be consistent with the latter statute. So construed, it follows that the Division of Highways has no authority to establish by rule a maximum weight of load greater than fourteen tons. The Division may, however, subject to the provisions of St. 1924, c. 457, establish a maximum load less than fourteen tons.

My answer to question (a), therefore, is that the Division, pursuant to the terms of the act, may establish a maximum weight of vehicle and load less, but not greater, than that fixed by G. L., c. 85, § 30. My answer to question (b) is in the affirmative, provided the rule is not made to apply to vehicles or objects which with their loads weigh more than fourteen tons. My answer to question (c) is in the negative with respect to the regulation of, and permits for, vehicles and objects which with their loads weigh more than fourteen tons, and in the affirmative with respect to such vehicles and loads weighing less than fourteen tons.

STATE HOSPITAL — TEMPORARY RELEASE OF PATIENT ON
VISIT — AUTHORITY OF SUPERINTENDENT.

While a patient committed for observation under G. L., c. 123, § 77, as amended by St. 1924, c. 19, cannot be discharged by the superintendent of the institution unless he is found to be sane, nevertheless, such superintendent may grant a leave of absence to any patient, including those committed for observation, by virtue of and in compliance with the provisions of G. L., c. 123, § 88.

You request my opinion as to the authority of a superintendent of a State hospital to release temporarily on visit a patient who has been committed by order of court for observation.

G. L., c. 123, § 77, as amended by St. 1924, c. 19, provides, in part, as follows:—

If a person is found by two physicians qualified as provided in section fifty-three to be in such mental condition that his commitment to an institution for the insane is necessary for his proper care or observation, he may be committed by any judge mentioned in section fifty, to a state hospital or to the McLean hospital, for a period of thirty-five days pending the determination of his insanity; provided, that such commitments shall be made to Gardner state colony only when legally authorized by the department. Within thirty days after such commitment the superintendent of the institution to which the person has been committed shall discharge him if he is not insane, and shall notify the judge who committed him, or if he is insane he shall report the patient's mental condition to the judge with the recommendation that he shall be committed as an insane person, or discharged to the care of his guardian, relative or friends if he is harmless and can properly be cared for by them. Within the said thirty-five days, the committing judge may authorize a discharge as aforesaid, or he may commit the patient to any institution for the insane as an insane person if, in his opinion, such commitment is necessary. If, in the opinion of the judge, additional medical testimony as to the mental condition of the alleged insane person is desirable, he may appoint a physician to examine and report thereon.

Under this section it is evident that the superintendent of the hospital only has authority to discharge the patient if he is found not to be insane. On the other hand, if the patient is found to be insane, the committing judge alone may authorize a discharge as provided in said section. But a discharge is plainly to be distinguished from a release or leave of absence.

G. L., c. 123, § 88, provides as follows:—

The superintendent or manager of any institution, after the examination required by section ninety-four has been made, may permit any inmate thereof temporarily to leave such institution in charge of his guardian, relatives, friends, or by himself, for a period not exceeding twelve months, and may receive him when returned by any such guardian, relative, friend, or upon his own application, within such period, without any further order of commitment, but no patient committed under section one hundred and one shall be permitted to temporarily leave the state hospital without the approval of the governor and coun-

cil, nor shall such permission terminate or in any way affect the original order of commitment. The superintendent or manager may require as a condition of such leave of absence, that the person in whose charge the patient is permitted to leave the institution shall make reports to him of the patient's condition. Any such superintendent, manager, guardian, relative or friend may terminate such leave of absence at any time and authorize the arrest and return of the patient. The officers mentioned in section ninety-five shall cause such a patient to be arrested and returned upon request of any such superintendent, manager, guardian, relative or friend. Any patient, unless he has been committed under section one hundred and one, who has not returned to the institution at the expiration of twelve months shall be deemed to be discharged therefrom.

Under this section the superintendent of the institution is vested with power to permit any inmate thereof temporarily to leave on visit in charge of his guardian, relatives, friends or by himself for a period not exceeding twelve months, and may terminate such leave of absence at any time and authorize the arrest and return of the patient. It is expressly provided that such permission to leave shall not "terminate or in any way affect the original order of commitment." Any patient, with the single exception noted in the above section, who has not returned to the institution at the expiration of twelve months "shall be deemed to be discharged therefrom."

I am accordingly of the opinion that while a patient committed for observation under said section 77, cannot be discharged by the superintendent of the institution unless he is found to be sane, nevertheless, such superintendent may grant a leave of absence to any patient, including those committed for observation, by virtue of and in compliance with the provisions of said section 88.

DEPARTMENT OF MENTAL DISEASES — RECORDS OF PSYCHIATRIC EXAMINATIONS.

The Department of Mental Diseases is not required to furnish results of psychiatric examinations had under G. L., c. 127, §§ 16 and 17, as amended by St. 1924, c. 309, to any person other than the person designated therein.

You state that county officers, State departments and private social agencies have requested the Department of Mental Diseases to furnish them with copies or abstracts of the case histories which have been compiled in compliance with St. 1924, c. 309. You request my opinion as to whether the department is required to give this information or whether the persons making such requests should be referred to the departments to which these records are forwarded.

St. 1924, c. 309, § 1, amended G. L., c. 127, § 16, by requiring that the keepers and masters of jails and houses of correction should cause a psychiatric examination of certain inmates to be made by a psychiatrist appointed by the Commissioner of Mental Diseases, in addition to the physical examination provided for by G. L., c. 127, § 16.

St. 1924, c. 309, § 2, amended G. L., c. 127, § 17, by substituting a new section, which provides, in part, as follows: —

Specifications governing the manner and time of such physical examinations and such psychiatric examinations shall be respectively promulgated by the departments of public health and mental diseases. Said departments shall respectively prescribe the medical and psychiatric records to be kept, shall require such laboratory and other diagnostic aids to be used as in their judgment are expedient, and shall forward to the commissioner (of correction) statements of the results of all such examinations, together with recommendations relative thereto, and the psychiatrists making such examination shall from time to time furnish such other information as the commissioner (of correction) may request.

The remaining portion of the section relates to the authority of the Commissioner of Correction to secure and to require information relative to offences committed by prisoners, their past history and environment, and to make record of examinations and investigations.

As pertaining to the Department of Mental Diseases,

To the
Commissioner
of Mental
Diseases.
1925
March 2.

"the case histories, which have been compiled in compliance with St. 1924, c. 309," are case histories relating to psychiatric examinations, from which the Department of Mental Diseases is required to forward to the Commissioner of Correction statements of their results. Neither St. 1924, c. 309, G. L., c. 127, nor any law brought to my attention, contains any provision requiring the Department of Mental Diseases to keep, file or record these case histories of examinations which the keepers and masters of jails and houses of correction have caused to be made. The duty of the Department of Mental Diseases is to forward to the Commissioner of Correction statements of the results of such examinations, together with recommendations.

As it is apparent that there is no expressed intention that these histories, as obtained by the Department of Mental Diseases, are for the use of the public (II Op. Atty. Gen. 381), and that they are preserved and retained, if at all, only for the information, convenience and proper administration of the Department of Mental Diseases (III Op. Atty. Gen. 136 and 351; VII Op. Atty. Gen. 8), I am of the opinion that it is not required by St. 1924, c. 309, G. L., c. 127, c. 4, § 7, cl. 26th, or c. 66, §§ 3, 10, to give this information other than to the Commissioner of Correction.

SMALL LOANS — UNLAWFUL CHARGES — WAIVER OF STATUTORY PROTECTION — ATTEMPTED EVASION OF THE STATUTE.

A borrower cannot by contract deprive himself of the right given by G. L., c. 140, § 90, to discharge the debt by tender of principal with interest at 18 per cent. G. L., c. 140, §§ 96-114, relating to loans of \$300 or less, cannot be evaded by paying \$301 to a borrower who desires to borrow less than \$300 with the understanding that he will at once pay back the excess.

To the Com-
missioner of
Banks.
1925
March 2.

You request my opinion as to whether G. L., c. 140, § 90, providing, in substance, for the discharge of a loan of less than \$1,000 by tender of the principal with interest at 18 per cent, is applicable in the case of a note containing a provision to the effect that the maker, "in consideration of

the loan, waives any and all benefit or relief from any law now in force or hereafter to be passed against the collection of the full amount of both principal and interest of this note."

In my opinion, a contract by the borrower to waive the provisions of said section 90 is against public policy and he is not thereby debarred from discharging his debt in the manner provided for by the statute. The very purpose of the statute is to provide borrowers with a means of relief from the results of improvident contracts. To hold that a borrower might contract to waive the benefit of the statute would be to render the statute nugatory. There are many cases in which it has been held that a contract to waive the protection afforded by a statute is void. See *Equitable Life Assurance Society v. Clements*, 140 U. S. 226. See, also, cases cited in Paige on Contracts, § 730. Am. & Eng. Ency. Law, s. v. "Waiver," p. 1107.

It is true that unless the borrower makes a tender under G. L., c. 140, § 90, judgment will be entered upon the note (*Shawmut Commercial Paper Co. v. Brigham*, 211 Mass. 72); but this does not mean that the borrower can contract away his right to discharge his debt by tender under that statute. See *Shea v. Metropolitan Stock Exchange*, 168 Mass. 282, 284.

You also ask my opinion as to whether G. L., c. 140, §§ 96-114, regulating the business of making loans of \$300 or less at more than 12 per cent, are applicable in the case of a lender who, in order to evade those statutory provisions, tells applicants for loans under \$300 that he will pay them \$301 and take their notes for that amount, and that they may at once repay the excess above what they require, and who puts the transaction through in that form.

In my opinion, the statutory provisions referred to are applicable to such transactions. I think that the court will look at the substance of the transaction and that the statutes cannot be evaded by so empty a form, adopted solely for the purpose of evading them.

FISH AND GAME — ARTIFICIAL PONDS.

G. L., c. 130, § 59, forbidding the taking of a pickerel less than twelve inches in length, applies to artificial as well as to natural ponds.

To the Com-
missioner of
Conservation.
1925
March 3.

You request my opinion as to whether the provisions of the General Laws controlling the open and closed seasons, catch limits, etc., on various kinds of fish (for instance, G. L., c. 130, § 59, as amended by St. 1923, c. 268, relating to pickerel) apply to ponds and reservoirs which have been created by the erection of dams at the outlets of smaller ponds and by dams constructed on unnavigable streams.

G. L., c. 130, § 59 (as amended by St. 1923, c. 268, § 2), reads as follows: —

Whoever takes from the waters of the commonwealth a pickerel less than twelve inches in length or has in possession any such pickerel shall be punished by a fine of one dollar for each pickerel so taken or held in possession; and in prosecutions under this section the possession of pickerel less than twelve inches in length shall be prima facie evidence of such unlawful taking.

In an opinion rendered by one of my predecessors (VI Op. Atty. Gen. 430) the words "waters of the Commonwealth," as used in said section 59, were construed as meaning waters within the Commonwealth and not waters belonging to the Commonwealth. This seems to include ponds which have been wholly or in part artificially created quite as much as natural ponds. In section 32 of said chapter 130 these two kinds of ponds are classed together. The special rights given by sections 36 and 37 of said chapter seem to be confined to those who "enclose" the waters of an unnavigable stream "for the cultivation of useful fish." See *Commonwealth v. Follett*, 164 Mass. 477; *Lynnfield v. Peabody*, 219 Mass. 322, 332.

I accordingly answer your question in the affirmative.

INTERSTATE RENDITION — FUGITIVE FROM JUSTICE — DUTY TO DELIVER UP FUGITIVE FROM JUSTICE.

The duty to deliver up a fugitive from justice rests upon the Constitution and the laws of the United States.

It is the duty of the governor of an asylum State to deliver up the fugitive if he is the person demanded, if he was in the demanding State when the offence was committed, and if the papers are in proper form.

No discretion is vested in the governor of the asylum State.

A person is a fugitive from justice if he was in the demanding State at the time of the commission of the alleged offence and thereafter left the State.

The fugitive's motive in leaving the State is immaterial.

The governor of the asylum State cannot legally consider the question of guilt or innocence.

The governor of the asylum State cannot be compelled to honor a requisition.

You have referred to me for my consideration the letter of the Governor of Texas in which she states her grounds for refusing to honor your requisition upon her for the interstate rendition of Albert P. Russell, charged by indictment with the crimes of desertion, nonsupport and abandonment of his wife and minor child.

To the
Governor.
1925
March 5.

At the hearing in Texas upon your requisition, as I am informed, Russell admitted that he was the person demanded and that he was in Massachusetts at the time of the alleged commission of the offences charged in the indictment. It was further admitted, I presume, that the papers accompanying your requisition are in proper form and duly authenticated, and that they properly charge a crime under the laws of this Commonwealth.

The ground for the denial of your requisition, as expressed in the letter of the Governor of Texas, is that the fugitive, in her opinion, is innocent of the crimes for which he was indicted in Massachusetts, and that he, therefore, and solely by reason of his supposed innocence, is not a fugitive from justice. I call to your attention the statutes and authorities which, in my opinion, govern the instant case and are binding upon the governor of every State.

U. S. Const., art IV, § 1, provides:—

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the con-

gress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2 of that article provides, in part: —

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

U. S. Const., art. VI, provides, in part: —

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

U. S. Rev. Sts., 1901, § 5278 (U. S. Comp. Sts., 1916, § 10126), provides, in part: —

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory *from whence the person so charged has fled*, it shall be the duty of the executive authority of the State or Territory *to which such person has fled* to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.

In *Lascelles v. Georgia*, 148 U. S. 537, 541, the Supreme Court of the United States said: —

Upon these provisions of the organic and statutory law of the United States rest exclusively the right of one State to demand, and the obligation of the other State upon which the demand is made to surrender, a fugitive from justice.

It is thus manifest that the duty to deliver up fugitives from justice rests upon the Constitution and laws of the United States, which are the supreme law of the land, and that the decisions of the Supreme Court of the United States are absolutely controlling. That these provisions of the Constitution and laws of the United States apply to all crimes and offences punishable by the law of the demanding State is clear. *Kentucky v. Dennison*, 24 How. (U. S.) 66, 103, 106; *Lascelles v. Georgia*, 148 U. S. 537, 542. The United States Supreme Court has repeatedly and consistently held that it is the *duty* of the governor upon whom a demand is made for the return of a fugitive to deliver him to the appointed agent of the demanding State if the papers are in proper form and if the fugitive was in the demanding State at the time of the commission of the alleged offence, and that the governor of the demanding State has no discretion in the matter. *Hogan v. O'Neil*, 255 U. S. 52; *Biddinger v. Commissioner of Police*, 245 U. S. 128; *Drew v. Thaw*, 235 U. S. 432, 439; *Strassheim v. Daily*, 221 U. S. 280, 285; *Bassing v. Cady*, 208 U. S. 386; *McNichols v. Pease*, 207 U. S. 100, 108; *Appleyard v. Massachusetts*, 203 U. S. 222, 227; *Lascelles v. Georgia*, 148 U. S. 537, 542; *Kentucky v. Dennison*, 24 How. 66, 103.

In *Appleyard v. Massachusetts*, 203 U. S. 222, 227, the United States Supreme Court said:—

A person *charged* by indictment or by affidavit before a magistrate with the commission within a State of a crime covered by its laws, and *who, after the date of the commission of such crime leaves the State—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another State must be delivered up by the Governor of such State to the State whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the State from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any State.*

In *McNichols v. Pease*, 207 U. S. 100, 108, the court said:—

When the Executive authority of the State whose laws have been thus violated makes such a demand upon the Executive of the State in which the alleged fugitive is found as is indicated by the above section (5278) of the Revised Statutes — producing at the time of such demand a copy of the indictment, or an affidavit certified as authentic and made before a magistrate charging the person demanded with a crime against the laws of the demanding State — it becomes, under the Constitution and laws of the United States, the duty of the Executive of the State where the fugitive is found to cause him to be arrested, surrendered and delivered to the appointed agent of the demanding State, to be taken to that State.

In *Bassing v. Cady*, 208 U. S. 386, 392, the court said:—

So far as the record shows it did not appear by proof that the accused was not in New York at the time the crime with which he was charged was committed. *If he was in New York at that time* (and it must be assumed upon the record that he was) *and thereafter left New York, no matter for what reason or under what belief, he was a fugitive from the justice of that State* within the meaning of the Constitution and laws of the United States. These views are in accord with the adjudged cases.

In *Drew v. Thaw*, 235 U. S. 432, 439, the court said:—

The Constitution says nothing about *habeas corpus* in this connection, but *peremptorily* requires that upon proper demand the person charged shall be delivered up to be removed to the State having jurisdiction of the crime. Article 4, § 2. *Pettibone v. Nichols*, 203 U. S. 192, 205. *There is no discretion allowed, no inquiry into motives. Kentucky v. Dennison*, 24 How. 66; *Pettibone v. Nichols*, 203 U. S. 192, 205.

It thus appears that it is clearly established that a person is a fugitive from justice if he was in the demanding State at the time of the commission of the alleged offence and thereafter left the State, regardless of his motive for leaving. It is also conclusively established that, as a matter of law, the only issues before the governor of the asylum State are:

(1) Are the papers accompanying the requisition in proper form?

(2) Is the alleged fugitive the person demanded?

(3) Was the fugitive in the demanding State at the time of the commission of the alleged offence?

If he determines these three questions in the affirmative, the foregoing authorities demonstrate that he has no discretion and that he has an absolute duty to honor the requisition and to surrender the fugitive to the demanding State.

In *Biddinger v. Commissioner of Police*, 245 U. S. 128, 134, the court said:—

The appellant admits: That he was in the State of Illinois at the time it is charged that he committed the crimes for which he was indicted; that the indictments are in the form, and are certified as, required by law, and that he was found in the State of New York. *This satisfies the requirement of the statute and by its terms makes it the duty of the Governor of New York to cause Biddinger to be arrested and given into the custody of the Illinois authorities.*

Applying the foregoing principles of law to your requisition for the return of Albert P. Russell to Massachusetts, it was admitted at the hearing in Texas that the papers accompanying your requisition were in proper form, that Albert P. Russell is the man sought, and that he was in Massachusetts at the time alleged in the indictment as the date of the commission of the offences. All three requirements having been complied with, I respectfully submit that, as a matter of law, the Governor of Texas has no discretion in the matter and that it is her duty to honor your requisition. The question of the guilt or innocence of Russell is one with which the Governor of Texas has no legal right to be concerned, and is solely within the jurisdiction of the courts of Massachusetts.

As I read the letter of the Governor of Texas denying your requisition, her denial is based solely upon the ground that Russell is innocent of the crimes for which he has been indicted. It must be obvious that if governors of asylum States adopted a policy of denying requisitions upon such

a ground, it would lead to a breakdown of interstate rendition and to the establishment of havens of refuge in the United States to which criminals might flee with the assurance that they were safe there, since the demanding State has no power to compel its witnesses to proceed to the asylum State for the purpose of proving the guilt of the fugitive. Such a policy would result also in setting up the governor of the asylum State as an extra-territorial court of the demanding State, a result which is unjustifiable in law and undesirable from the point of view of sound administration of justice.

It is well established that there is no power to compel the governor of an asylum State to honor the requisition of the governor of the demanding State if, contrary to his legal duty, he declines to do so. *Kentucky v. Dennison*, 24 How. 66, 109. But the very fact that the governor of the asylum State cannot be compelled to do his duty ought to make him exceedingly careful lest he fail to do that which the law says he must do. In *Kentucky v. Dennison*, *supra*, at page 109, the Supreme Court of the United States said: —

The performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793.

And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union.

And in *McNichols v. Pease*, 207 U. S. 100, 112, the court said: —

We may repeat the thought expressed in *Appleyard's case* (203 U. S. 222), above cited, that a *faithful, vigorous enforcement* of the constitutional

and statutory provisions relating to fugitives from justice is vital to the harmony and welfare of the States, and that "while a State should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum in the territory of another State."

The Governor of Texas states further in her letter to you that she believes that "the prosecution was inspired by a desire upon the part of his wife to collect some money rather than the mere enforcement of your criminal law." I assume without question that she did not thereby intend to impugn the good faith of Massachusetts or of its officials charged with the administration of criminal law. Permit me to assure you that no request or attempt to collect money from Russell was at any time made by any official of Massachusetts, and that no threat of prosecution if Russell failed to contribute to his wife's support was ever made by any official of this Commonwealth. The complaining witness at no time intimated to any official of the Commonwealth that she desired Russell prosecuted because of any ulterior motive. Permit me further to assure you that the Commonwealth of Massachusetts has at no time had, and does not now have, any motive or desire in this matter except to prosecute Russell for the crimes for which he was indicted.

In view of the foregoing principles of law and of a proper regard for the considerations of sound policy and proper administration of criminal law, and feeling that the Governor of Texas must agree with you that a haven of refuge to which criminals might flee without fear of being called upon to answer for their misdeeds ought not to be established anywhere in the United States, I suggest that you request her to reconsider her decision and to honor your requisition for the interstate rendition of Albert P. Russell.

CONSTITUTIONAL LAW — PUBLIC OWNERSHIP — LEGISLATIVE POWER TO AUTHORIZE A GRANT OF LAND BY A CITY TO THE TRUSTEES OF A COLLEGE — STATUTORY CONSTRUCTION.

The Legislature may authorize the transfer of public land to the trustees of a college, upon adequate compensation.

To the
Governor.
1925
March 17.

You have submitted to me for examination and report House Bill No. 1132, entitled "An Act authorizing the city of Worcester to grant to the Trustees of the College of the Holy Cross certain rights in certain land and waters of said city."

The object of this bill is to authorize the city of Worcester "to grant" to the Trustees of the College of the Holy Cross rights in the nature of easements for building purposes in connection with a stadium, in certain lands previously taken by the city under the provisions of St. 1900, c. 460.

The Legislature undoubtedly has the power to authorize the transfer of land and rights therein taken by eminent domain to private owners when such a change has taken place in conditions relative to the land that its public ownership is no longer essential to the purpose for which it was acquired. *Wright v. Walcott*, 238 Mass. 432. The Legislature may not, however, give or authorize the gift of public property for private purposes, though it may lease or sell it for such purposes upon receipt of adequate consideration. *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371; *Moore v. Sanford*, 151 Mass. 285.

The Legislature may transfer property and property rights taken by eminent domain from one administrative body to another or to the use of a public charitable trust, but since the enactment of Mass. Const. Amend. XLVI, § 2, the Legislature may not make or authorize "a grant" of public property for the purpose of aiding any institution of learning "wherein any denominational doctrine is inculcated" nor to "any college, . . . institution, educational, charitable or religious undertaking which is not publicly

owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both."

The word "grant" has more than one meaning. It may apply to the mode of creating a title in an individual to lands of the sovereign and to the transfer of property of the sovereign to an individual, quite apart from any specific consideration furnished by the individual. This meaning was given to the word frequently in Colonial times, and is often used in this sense in the phrases "public grant" and "land grant." It is used with this meaning in Mass. Const. Amend. XLVI.

The word "grant" and the words "to grant," which are employed in the instant bill, have another well-recognized significance derived from common law usage, and mean the transfer by deed of any property. The word is used with this latter meaning in the instant bill.

The word "grant" when used in this latter sense may comprehend a transfer with or without compensation, but as employed by the Legislature in the instant bill it is assumed that it is employed in a narrow rather than in a generic sense, and that it authorizes the city to complete a transfer to the designated trustees upon adequate consideration. To interpret the word otherwise would make it necessary to say that the act was unconstitutional. The assumption is that the intention of the Legislature, in its use of words, is such as to render possible the interpretation of an act as constitutional. *Perkins v. Westwood*, 226 Mass. 268.

Assuming, then, that the bill gives to the city of Worcester authority to make proper transfer of the enumerated property rights, that is, one made upon adequate consideration, the act is, in my opinion, constitutional.

CONSTITUTIONAL LAW — PROHIBITION OF RESALE OF
REDUCED FARE RAILROAD TICKETS.

A statute forbidding the resale of railroad commutation tickets under certain circumstances would be constitutional.

To the
Counsel to
the Senate.
1925
March 17.

At the instance of the committee on bills in the third reading you request my opinion as to the constitutionality of House Bill No. 1099, entitled "An Act relative to the sale of certain tickets issued by railroad corporations."

The bill reads as follows:—

Chapter one hundred and sixty of the General Laws is hereby amended by inserting after section one hundred and ninety-eight the following new section:

Section 198A. Whoever, except a person authorized so to do by the railroad company issuing the same, sells or offers for sale any railroad ticket or portion of such a ticket entitling the holder or any specified person or persons to passage wholly within the commonwealth on any railroad passenger train or trains, such ticket or portion of a ticket having been put out by the railroad company issuing the same at a price less than the rate of a full one way fare for such passage under the tariff provisions then in force, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than one month, or both.

The Legislature has the power to make reduced rate tickets non-transferable. See *Bitterman v. Louisville & Nashville R.R. Co.*, 207 U. S. 205; Am. & Eng. Enc. L., vol. 28, p. 164.

It would seem, likewise, that the Legislature has the power to impose a penalty upon the transfer by resale of such tickets, if it finds that such a course is reasonably necessary in order to restrict the use of such tickets to the purposes for which they are intended.

As to twelve-trip commutation tickets between Boston and stations within a radius of fifteen miles, the railroads are required to issue these under the provisions of G. L., c. 160, § 190. These tickets are not intended to give the occasional traveler the means of riding at less than the rate

fixed as proper for a single trip; and it would seem that the Legislature has ample power to restrain the use of these tickets to the purpose intended.

I understand that the tickets to which the bill applies are made redeemable under the tariff regulations.

Legislation similar to the bill here in question has frequently been held constitutional. *State v. Corbett*, 57 Minn. 345; *Burdick v. People*, 149 Ill. 600; *Commonwealth v. Wilson*, 14 Phila. 384; *Commonwealth v. Keary*, 198 Pa. 500; *Ex parte Hughes*, 50 Tex. Cr. R. 614; *Fry v. State*, 63 Ind. 552; see Black, Constitutional Law, p. 409; but see *People v. Warden of Prison*, 157 N. Y. 116.

In *People v. Steele*, 231 Ill. 340, where it was held that an act prohibiting the resale of theatre tickets at an advance price was unconstitutional, the court recognized the validity of *Burdick v. People*, 149 Ill. 600, saying, "but a railroad company has a franchise from the State, and the manner in which its business as a carrier shall be conducted is clearly under the control of the Legislature." In this Commonwealth the regulation of the resale price of theatre tickets is constitutional. See *Opinion of the Justices*, 247 Mass. 589.

Although the present bill is broad, in that it is not confined to those who engage in the business or practice of reselling, and also in that it applies to the resale of tickets already issued (these, however, as I understand, being redeemable under the tariff regulations), I am of the opinion that it is constitutional.

CONSTITUTIONAL LAW — ELECTION OF CITY OFFICIALS — PROPORTIONAL REPRESENTATION.

A statute providing for the election of city officials in such a way as to permit the voters to express a choice between candidates in numerical order would violate no provision of the State Constitution.

You ask my opinion as to the constitutionality of Senate Bill No. 193, entitled "An Act to provide for the election of city officials by the method of proportional representation."

To the House
Committee on
Election Laws.
1925
March 20.

The purpose of this bill is to authorize any city which accepts the provisions of the act to elect the members of its legislative body, to be known as the council, from the city at large by the method of proportional representation, and to provide for the election also of the mayor and school committee in accordance with the provisions of the act. Briefly described, and without attempting to specify its details, the method is to permit the voters to express a choice between candidates in numerical order, and, in determining what candidates are elected, by successive counts to distribute the surplus over a determined quota received by an elected candidate or the votes received by an eliminated candidate among subsequent choices. In the report of George R. Nutter and Dora Emerson Wheeler, members of the Boston Charter Revision Commission (House Document No. 1220, 1924), the following statement is made concerning this system (Rep., pp. 22, 23): —

Proportional representation seems to be a successful effort to overcome the defects of the plurality system, which has resulted in the practical disfranchisement of many electors and general indifference to if not actual disbelief in democratic institutions. This new system was first used in Denmark in 1855. It has spread slowly until now two hundred and fifty million people in every part of the world use it in one form or another. It has made a very modest entrance into American municipal elections. . . . The length of time during which it has been used and the present universality of its application are sufficient evidence of its soundness and practicability.

The plurality system aims at securing a majority. It gives no consideration to the minority and if, in any way, the actual majority can be split, the minority may secure all of the representation. Proportional representation, on the contrary, is the practical application of the principle that in the election of any representative body the majority of the voters should secure a majority of the places, but that the minority should be represented in proportion to their strength.

The question whether the system of election by proportional representation is constitutional depends upon the provisions of our State Constitution; there is nothing in the Federal Constitution which is at all applicable.

The following provisions in the Constitution of Massachusetts should be considered. They appear in pt. 1st, art. IX; pt. 2nd, c. I, § I, art. IV; and Mass. Const. Amend. II and XIV.

These provisions are respectively as follows:

Mass. Const., pt. 1st, art. IX:

All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

Mass. Const., pt. 2nd, c. I, § I, art. IV:—

And further, full power and authority are hereby given and granted to the said general court, from time to time . . . to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for . . .

Mass. Const. Amend. II:—

The general court shall have full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this commonwealth, and to grant to the inhabitants thereof such powers, privileges, and immunities, not repugnant to the constitution, as the general court shall deem necessary or expedient for the regulation and government thereof, and to prescribe the manner of calling and holding public meetings of the inhabitants, in wards or otherwise, for the election of officers under the constitution, and the manner of returning the votes given at such meetings. Provided, that no such government shall be erected or constituted in any town not containing twelve thousand inhabitants, nor unless it be with the consent, and on the application of a majority of the inhabitants of such town, present and voting thereon, pursuant to a vote at a meeting duly warned and holden for that purpose. And provided, also, that all by-laws, made by such municipal or city government, shall be subject, at all times, to be annulled by the general court.

Mass. Const. Amend. XIV:—

In all elections of civil officers by the people of this commonwealth, whose election is provided for by the constitution, the person having the highest number of votes shall be deemed and declared to be elected.

The 3d, 20th, 29th, 30th, 31st, 32nd, 38th, 40th, 45th, 61st and 68th Amendments, relating to qualifications of voters and regulations of the method of voting, have no important application to the present question.

The provision in article IX of the Declaration of Rights that "all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an *equal right* to elect officers" means clearly that there shall be no classes or distinctions between qualified voters as to the value of their votes at the polls. So long as each qualified voter has a right equal to that of other qualified voters to cast a ballot for the election of officers, there can be no infringement of this principle. See *Cole v. Tucker*, 164 Mass. 486; *Commonwealth v. Rogers*, 181 Mass. 184; *Graham v. Roberts*, 200 Mass. 152, 154, 155; VI Op. Atty. Gen. 462. There seems, therefore, to be nothing in this provision to forbid the use of the method of proportional representation in elections.

The provisions in Mass. Const., pt. 2nd, c. I, § I, art. IV, and in Mass. Const. Amend. II, giving to the General Court the power to provide for the naming and settling of all civil officers within the Commonwealth whose election is not provided for by the Constitution, the power to constitute city governments and to prescribe the manner of holding public meetings for the election of officers under the Constitution, and the manner of returning the votes given at such meetings, give to the General Court a broad and general power to deal with the subject of municipal elections in any manner not contrary to the Constitution. See *Commonwealth v. Plaisted*, 148 Mass. 375, 385, *et seq.*; *Graham v. Roberts*, 200 Mass. 152, 154. The provision in Mass. Const. Amend. XVI, that in elections of civil officers whose election is provided for by the Constitution the person having the highest number of votes shall be elected, does

not apply to officers of municipal governments. The inference from this article, if any is to be drawn, is, by application of the principle *expressio unius est exclusio alterius*, that in elections of other officers the plurality system is not required.

The question which you ask has never come before our court, but there are decisions of other courts which should be referred to. It should be noted in this connection that there is a difference in the constitutions of the different States, some providing that every qualified voter shall have the right to vote for all officers to be elected and others providing simply that they shall have an equal right to vote. The Supreme Court of Rhode Island has said that an act providing for election by proportional representation violated a provision of the Rhode Island constitution to the effect that electors had the right to vote in the election of all civil officers. *Opinion of the Justices*, 21 R. I. 579. In *Wattles ex rel. Johnson v. Upjohn*, 211 Mich. 514, it was held that under the Michigan constitution a provision for the election of a city council by proportional representation was in violation of a clause in the State constitution that "in all elections every . . . (defining at length qualified voters) shall be an elector entitled to vote." In *People v. Elkus*, 59 Cal. App. 396, it was held that an act providing for proportional representation was in conflict with a provision of the constitution that the electorate "shall be entitled to vote at all elections." In Ohio the constitutionality of this system was sustained. *Reutener v. Cleveland*, 107 Ohio St. 117. I find nothing, however, in the Constitution of this Commonwealth with which the bill in question seems to be in conflict.

In my opinion, there is no constitutional objection to the use of the method of proportional representation in the election of city officials in the way proposed.

GOVERNOR AND COUNCIL — DUTIES UNDER THE CONSTITUTION.

The duties of the Council, under the Constitution and the statutes, are to be performed in conjunction with the Governor, and consist in approving or disapproving his acts, or joining with him as an executive board.

When the Governor and Council act as an executive board, the Governor, as a member, may cast one vote; where the Governor acts with the advice and consent of the Council, each must act independently of the other and both must concur in order that action may be effective.

To the
Governor.
1925
March 24.

You ask my opinion upon the following questions: —

First. What, if any, inherent power or initiative has the Council, acting or attempting to act, independent of the Governor?

Second. To what extent may the Governor be directed or bound by vote of the Council when lawfully met in executive session?

The broad and general scope of these questions makes it difficult to give a definite and precise opinion. I can hardly do more in reply than to outline the powers and duties of the Council in relation to the Governor as they are indicated by the Constitution and the statutes of the Commonwealth and interpreted by the opinions of the justices of our Court. This general discussion, it should be noted, may not furnish a sufficient guide for the determination of any particular question which may hereafter arise.

The Executive Council is a body established by the Constitution "for advising the governor in the executive part of the government," and the Governor, with the Councillors, is authorized to "hold and keep a council, for the ordering and directing the affairs of the Commonwealth, according to the laws of the land." Mass. Const., pt. 2nd, c. II, § III, art. I. Cf. c. II, § I, art. IV. The Council is required to keep a record of its resolutions and advice (c. II, § III, art. V).

The duties which under the Constitution the Executive Council has to perform are of two kinds. As is said in *Opinion of the Justices*, 190 Mass. 616, 618: —

The Constitution recognizes two kinds of executive business which may come before the Council: one, that which is to be done by the

Governor and Council acting together as an executive board, and the other, business to be done by the Governor, acting under the responsibility of his office as supreme executive magistrate, by and with the advice and consent of the Council.

As to other executive business the Governor may take the advice of the Council or not, as he chooses.

Generally, in describing the first kind of business the words "governor and council" are used in the Constitution, while in describing the latter kind of business the phrase used is "governor, by and with the advice and consent of the council," or some similar expression. Examples of the first kind may be found in Mass. Const., pt. 2nd, c. I, § II, art. III; c. I, § III, art. XI; c. II, § IV, art. II; c. III, art. II and V; c. VI, art. I and II; Amend. XVI. Examples of the second kind may be found in c. I, § I, art. IV; c. II, § I, art. V, VI, VIII, IX and XI; c. III, art. I; Amend. IV; Amend. XVII; Amend. XXV; Amend. XXXVII; Amend. LVIII.

It is difficult to define just the sort of business which is to be done by the Governor and Council as an executive board. The examination of records and the counting of votes, such as is provided for by Mass. Const., pt. 2nd, c. I, § II, art. III, Amend. XVI, and G. L., c. 54, §§ 115, 116 and 118, is a familiar instance. Mass. Const., pt. 2nd, c. II, § II, art. II, provides that "the governor . . . shall be president of the council, but shall have no vote in council." It has been intimated, however, that in cases where the Governor and Council act as an executive board the Governor, as a member of the board, may cast one vote. See *Sparhawk v. Sparhawk*, 116 Mass. 315, 317; *Opinion of the Justices*, 211 Mass. 632.

In the cases where the Governor is required to act with the advice and consent of the Council, the responsibility rests primarily on the Governor to determine what action, if any, should be taken, and the Council must thereupon express its approval or disapproval. Each must act independently of the other and both must concur in order

that effective action may be taken. *Opinion of the Justices*, 190 Mass. 616; 210 Mass. 609; 211 Mass. 632; VI Op. Atty. Gen. 131.

Turning now more specifically to the questions which you have asked, it is said in *Opinion of Justices*, 214 Mass. 602, 604: —

Nowhere in the Constitution are any duties conferred upon the Council, except such as they are to perform in conjunction with the Governor, either approving or disapproving his facts or joining with him as an executive board.

Moreover, I find nothing in the statutes conferring additional powers and duties upon the Council alone. This, I think, is an answer to your first question as I understand it.

Your second question, I think, is answered by what I have already said. In those cases where action by the Governor with the advice and consent of the Council is required, the Council has the power by its disapproval to nullify the action of the Governor; while in cases where the Governor and Council act as an executive board, they are bound to act conjointly.

INSANE PERSONS — REQUIREMENTS FOR COMMITMENT — MEDICAL CERTIFICATES OF INSANITY.

But one medical certificate of insanity is required for the commitment of an insane person, either for observation or for permanent commitment.

A copy of the certificate, attested by the judge, should be delivered with the insane person to the superintendent of the institution to which such person shall have been committed, there to be kept on file with the order of commitment; and said superintendent should forthwith transmit to the Department of Mental Diseases copies of such certificate, of the order of commitment and of the statement required by G. L., c. 123, § 54.

You request my opinion as to the proper procedure in connection with medical certificates of insanity in the case of persons who were first committed for observation and then committed as insane at the end of the observation period.

G. L., c. 123, § 51, provides, in part, as follows: —

No person shall be committed to any institution for the insane designated under or described in section ten, except the Massachusetts school for the feeble-minded and the Wrentham state school, unless there has been filed with the judge a certificate in accordance with section fifty-three of the insanity of such person by two properly qualified physicians, nor without an order therefor, signed by a judge named in the preceding section stating that he finds that the person committed is insane and is a proper subject for treatment in a hospital for the insane.

G. L., c. 123, § 53, outlines the qualifications of physicians empowered to make certificates of insanity, and provides:—

. . . A copy of the certificate, attested by the judge, shall be delivered with the insane person to the superintendent of the institution to which the person shall have been committed, to be kept on file with the order of commitment, and said superintendent shall forthwith transmit to the department, copies of such certificate, or the statement required by the following section and of the order of commitment. Any certificate bearing date more than ten days prior to the commitment of any person alleged to be insane shall be void, and no certificate shall be valid or received in evidence if signed by a physician, holding any office or appointment, other than that of consulting or advisory physician, in an institution for the insane to which such person is committed.

G. L., c. 123, § 77, as amended by St. 1924, c. 19, provides for the disposition of persons committed for observation as to their sanity when found by two physicians, qualified as provided in section 53, to be in such mental condition that commitment to an institution for the insane is necessary for their proper care or observation. This section provides, in part, as follows:—

Within thirty days after such commitment the superintendent of the institution to which the person has been committed shall discharge him if he is not insane, and shall notify the judge who committed him, or if he is insane he shall report the patient's mental condition to the judge with the recommendation that he shall be committed as an insane person, or discharged to the care of his guardian, relatives or friends if he is harmless and can properly be cared for by them. Within the said thirty-five days, the committing judge may authorize a discharge as aforesaid, or he may commit the patient to any institution for the insane as an insane person if, in his opinion, such commitment is necessary.

If, in the opinion of the judge, additional medical testimony as to the mental condition of the alleged insane person is desirable, he may appoint a physician to examine and report thereon.

Under these statutes it seems clear that but one medical certificate of insanity is required for the commitment of a person either for observation or for permanent commitment. All that seems required is that a copy of the certificate, attested by the judge, shall be delivered with the insane person to the superintendent of the institution to which such person shall have been committed, there to be kept on file with the order of commitment, and that said superintendent shall forthwith transmit to the Department of Mental Diseases copies of such certificate, of the order of commitment and of the statement required by G. L., c. 123, § 54. Accordingly, if this is done it would seem that the present requirements of the statute are fulfilled.

GENERAL APPROPRIATION BILL — GOVERNOR'S DIS- APPROVAL OF CERTAIN ITEMS — VOTE BY HOUSE.

The Governor, in disapproving or reducing items in a general appropriation bill, is required to transmit his reason as to each item.

His act as to each such item is an independent act.

The House of Representatives is required to take a ye and nay vote on each item disapproved or reduced.

To the
House of Rep-
resentatives.
1925
March 31.

You state that His Excellency the Governor has returned the general appropriation bill, having disapproved or reduced certain items therein, and you request my opinion whether the House of Representatives is authorized to vote on the several items disapproved or reduced by means of one ye and nay vote, unless a member asks for a division of the question as provided for in Rule 91 of the House, or whether a ye and nay vote is required on each specific item.

Mass. Const. Amend. LXIII, § 5, provides: —

The governor may disapprove or reduce items or parts of items in any bill appropriating money. So much of such bill as he approves shall

upon his signing the same become law. As to each item disapproved or reduced, he shall transmit to the house in which the bill originated his reason for such disapproval or reduction, and the procedure shall then be the same as in the case of a bill disapproved as a whole. In case he shall fail so to transmit his reasons for such disapproval or reduction within five days after the bill shall have been presented to him, such items shall have the force of law unless the general court by adjournment shall prevent such transmission, in which case they shall not be law.

This section requires the Governor to transmit as to *each* item disapproved or reduced his reason for such disapproval or reduction. His act as to each such item is consequently an independent act which, in my opinion, requires separate action by the House. Moreover, the requirement that the "procedure shall then be the same as in the case of a bill disapproved as a whole" is part of the same sentence which requires the Governor to transmit his reason as to each item. This sentence should be read and construed as a whole, in the light of the entire section. So read and construed, I am of the opinion that the House is required to take a yea and nay vote on each specific item disapproved or reduced.

TRUST COMPANIES — SALE OF STOCK FOR NON-PAYMENT OF AN ASSESSMENT.

Under G. L., c. 172, § 25, stock cannot be sold for non-payment of an assessment within less than three months from the time of giving notice to the stockholder.

You ask my opinion as to whether, under G. L., c. 172, § 25, the stock held by a stockholder in a trust company may be sold for non-payment of an assessment at the end of three months from the date when the Commissioner has given notice to the trust company, or whether the directors must wait for three months from the time that notice has been given to the stockholder before making the sale.

To the Com-
missioner of
Banks.
1925
April 2.

In my opinion, the statute must be construed as giving the stockholder three months from the date on which he received notice of an assessment before his stock can be sold for non-payment of such assessment.

TEACHERS' RETIREMENT ASSOCIATION — REEMPLOYMENT OF RETIRED TEACHER.

A retired teacher cannot be reemployed as a teacher, but is not ineligible for employment in some other capacity, provided the employer does not pay any part of the pension received by such retired teacher (G. L., c. 32, § 91).

To the Com-
missioner of
Education.
1925
April 6.

You ask my opinion upon the following questions: —

Can a retired member of the Teachers' Retirement Association sixty years of age or over be employed in the public schools of Massachusetts —

1. As a regular teacher or as a permanent substitute on an annual salary basis?
2. As a temporary teacher or substitute receiving salary on a per diem basis?
3. As a teacher in the evening schools?
4. In any capacity, such as clerk, clerical assistant or janitor in a school or in a school department?

The words used in G. L., c. 32, § 10, are "retired from service in the public schools."

I think it is a fair inference from these words that a teacher so "retired" shall not be reemployed as a regular teacher on an annual salary basis.

In my opinion, however, the words above quoted should be construed as meaning retired from the kind of service being performed, *i.e.*, service as a "teacher," in the sense in which that word is used in the statutory provisions for retirement. Apparently a temporary substitute receiving no salary would not be eligible to membership in the association (G. L., c. 32, § 6); and so would not be a "teacher" within the meaning of the statute. Nor does a teacher in the evening schools come within the statute, for "public school" is defined in section 6 as a "day school." Also,

the kinds of employment referred to in question 4 are not of the sort referred to in the statute.

Another statutory provision which might bear upon the questions which you ask is G. L., c. 32, § 91, which reads as follows:—

No person while receiving a pension or an annuity from the commonwealth, or from any county, city or town, except teachers who on March thirty-first, nineteen hundred and sixteen, were receiving annuities not exceeding one hundred and eighty dollars per annum, shall, after the date of the first payment of such annuity or pension, be paid for any service rendered to the commonwealth, county, city or town which pays such pension or annuity, except for jury service or for service rendered in an emergency under section sixty-eight, sixty-nine or eighty-three, or for service in a public office to which he has been elected by the direct vote of the people.

This section refers to employment of any nature; and I do not think that it is intended to permit a teacher who has been retired from service in the public schools, under section 10, to be reemployed as a regular teacher, even on the assumption that such retired teacher is not receiving an annuity in excess of \$180.

But it does not seem that this section 91 prevents the employment of a retired teacher in any of the capacities referred to in questions 2, 3 and 4, for the reason that the employment to which you presumably refer in these questions is an employment by a city or town, whereas the annuity fund is made up from assessments on members (G. L., c. 32, § 9, cl. 2), and the pension fund from appropriations by the General Court (G. L., c. 32, § 9, cl. 3). If the employment were by the Commonwealth, or if the annuity or pension fund were paid in part by the employing city or town, no teacher whose annuity exceeded \$180 could then be employed. See V Op. Atty. Gen. 250.

I accordingly answer question 1 in the negative, and questions 2, 3 and 4 in the affirmative.

CONSTITUTIONAL LAW — RIGHT OF PETITION — FEE FOR FILING BILL OR RESOLVE.

The right to petition the Legislature for redress of grievances, under article XIX of the Declaration of Rights, does not extend to the initiating of legislation by the filing of a bill or resolve.

A reasonable fee may be imposed by the Legislature for the filing of a bill or resolve, in certain cases.

To the Joint
Committee
on Rules.
1925
April 9.

You request my opinion as to the constitutionality, if enacted into law, of a bill entitled "An Act providing that petitioners for legislation shall pay a filing fee," which provides: —

Chapter three of the General Laws is hereby amended by inserting after section four the following new section: — *Section 4A.* Except as hereinafter provided, every petition to the General Court seeking legislation which is accompanied by a bill or resolve shall also be accompanied by a fee of two dollars, which shall be paid by the petitioner, and turned into the treasury of the commonwealth by the clerk of the branch receiving the same. Said fee shall be in addition to any other fee or deposit required under this chapter. This section shall not apply to a report required by law or to a petition by any body politic or any board or officer thereof in relation exclusively to the affairs of such body politic, and the decision of the clerk of the branch wherein said petition is filed as to whether said petition is a report required by law or relates exclusively to the affairs of such body politic shall be final.

The language of article XIX of the Declaration of Rights in the Constitution of the Commonwealth is as follows: —

The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

The right of petition, which this provision secures, is of considerable antiquity. Prior to the seventeenth century, however, its exercise was "practically restricted for many centuries to petitions for the redress of personal and local

grievances, and the remedies sought by petitioners were such as courts of equity and private acts of Parliament have since been accustomed to provide." See 1 May, Const. History, p. 410; Broom, Const. Law, p. 509. Statutes regulating the disposal and mode of considering these petitions were enacted as early as the time of Edward I. See Broom, Op. Cit. p. 508, *n*. The later rise of the practice of petitioning upon political subjects met with repressive measures upon the part of Charles II and his Parliament. In 1661 the statute of 13 Charles II, c. 5, after reciting that tumultuous and disorderly petitioning upon public matters had been a great means of national disturbances, forbade the procuring of more than twenty names to a petition "for alteration of matters established by law in church or state" unless with the consent of certain county officers; and forbade any one to repair to the King or Parliament to present any petition accompanied by more than ten other persons. Except for these restrictions, however, the right was to be enjoyed as theretofore. In 1679 a proclamation was also issued forbidding the signing of petitions to the King for the assembling of Parliament. See May, Op. Cit. p. 411; Broom, Op. Cit. pp. 510, 511.

In 1688 seven bishops who had petitioned to be excused from complying with the terms of an alleged illegal order of James II were tried for libel and acquitted. *Case of the Seven Bishops*, 3 Mod. 212; *Trial of the Seven Bishops*, 12 How. St. Trials, 183. Subsequently, in that same year, the statute 1 W. & M. St. II, c. 2, "An Act for declaring the rights and liberties of the subject and settling the succession of the Crown," after reciting among the wrongs done by James, his "committing and prosecuting divers worthy prelates, for humbly petitioning" as above, declared: "5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal." This provision is the original forerunner of article XIX of the Massachusetts Declaration of Rights, of the corresponding provision in the First Amendment

to the Constitution of the United States, and of the numerous similar provisions in other State constitutions.

Since 1688, it has been deemed established that petitioning is not in itself illegal (see Broom, *Op. Cit.* p. 512), but for a century thereafter there was a marked reluctance of Parliament to receive or give attention to petitions of which it disapproved, and in 1781 Lord Mansfield held that the statute of 13 Charles II, c. 5, was not repealed by 1 W. & M. St. II, c. 2. Douglas, 590, 592; Broom, *Op. Cit.* 513; Cooley's Blackstone, vol. 1, 2nd ed., p. 143, *n.* In 1819, also, the statute of 60 George III, c. 6, instituted elaborate regulations of petitioning, to continue in force for five years. In more recent times, however, petitions upon general legislative and political matters have been freely received so long as respectfully worded and complying with prescribed forms. See Broom, *Op. Cit.* p. 513; May, *Parliamentary Practice*, 13th ed., pp. 610–613. The actual presentation of the petition must now be made by a member (May, *Parliamentary Practice*, 13th ed., p. 614), but a member is not liable to an action by a petitioner for declining so to present (*Chaffers v. Goldsmid*, 1894, 1 Q.B. 186).

The provisions of chapter 20 of the Laws of the Province of Massachusetts Bay of 1735–6 were as follows: —

Whereas persons are frequently put to great cost and charge in making answers to causeless petitions preferred to the general court of this province; for remedy whereof, —

Be it enacted by His Excellency the Governor, Council and Representatives in General Court assembled, and by the authority of the same,

SECT. 1. That for the future, when any petition or complaint exhibited to the general court shall be dismissed as vexatious or causeless, the respondent or adverse party shall be entitled to have and receive, of the petitioner or complainant, all such reasonable costs and damages as he or they have sustained in attending or making answer to such petition or complaint.

And be it further enacted by the authority aforesaid,

SECT. 2. That no petition shall be received into the court, except the same be preferred within the space of fourteen days from the first sitting of said court, unless the cause upon which the petition is founded arose within the sitting of said court.

SECT. 3. This act to continue and be in force for five years from the publication thereof, and from thence to the end of the next session of the general court, and no longer.

This statute was continued in force at least until November 1, 1785. Province Laws 1779–80, c. 18.

To summarize from the foregoing, it would seem that when the constitutional guaranty was adopted, the right of petition was understood to be susceptible of reasonable regulation to prevent abuses, and more particularly to prevent breaches of the peace. See, also, Rawle on the Constitution, 2nd ed., p. 124. Cf. *Commonwealth v. Porter*, 1 Gray, 476, 477. Such a conclusion would come within the scope of the generalization by the court in *Capen v. Foster*, 12 Pick. 485, 488, that —

In all cases, where the constitution has conferred a political right or privilege, and where the constitution has not particularly designated the manner, in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power, to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right, in a prompt, orderly and convenient manner. Such a construction would afford no warrant for such an exercise of legislative power, as, under the pretence and color of regulating, should subvert or injuriously restrain the right itself.

The last sentence of this passage is a reminder, however, that the enunciation of the constitutional guaranty was undoubtedly intended to protect the right from invasion under the pretext of regulation.

I find no suggestion of authority, however, for the proposition that the right to petition includes any right to institute or participate in any way in the actual process of legislation. The "natural right" of petition, to which reference has often been made (see *United States v. Cruikshank*, 92 U. S. 542, 551–2; Story on the Constitution, 4th ed., pp. 619, 620; Cooley, Const. Lim., 7th ed., pp. 497–498), can hardly be thought to extend so far. Thus, while

I have found no instance of any fee imposed upon the presenting of petitions which merely apprised the body petitioned to of the opinions and wishes of the petitioners upon some public or private matter, it does appear that in the standing orders of the House of Commons from 1685 to 1822 it was provided that, —

No Bill, or Clause, for the particular interest or benefit of any person or persons, county or counties, corporation or corporations, or body or bodies of people, be read a second time unless fees be paid for the same.

Manual of the Practice of Parliament (1829), p. viii. So, also, there appears to have been in effect since 1700 an elaborate schedule of fees to be paid by the sponsors of private bills at various stages of progress. *Id.* pp. xlix–liii. See, also, a similar schedule for the House of Lords, dated 1824. *Id.* lxxxix.

This practice respecting fees for private bills persists to the present day. See May, Parliamentary Practice, 13th ed., p. 671. It is to be noted that the line of division between private and public bills rested upon their subject-matter (see Manual, *supra*, p. 2; May, Parliamentary Practice, 13th ed., pp. 657–667); and that while a private bill might be founded upon the petition of private sponsors, pursuant to the standing orders, public bills could be instituted only upon the individual responsibility of members. Manual, *supra*, p. 6; May, Parliamentary Practice, 13th ed., pp. 379–383. This precedent for the charging of fees is even more significant when it is recalled that the right to petition for the redress of those private grievances which would be the subject of private bills was, as has been seen above, the older and better established aspect of the right of petition. It thus clearly appears that participation in the initiating of legislation by the filing of bills was not deemed a feature of the right to petition, but was a privilege wholly denied to the subjects in respect of so-called public bills, and extended to private

persons with respect of the so-called private bills upon the payment of substantial fees.

The present bill relates to a situation almost precisely similar to that which for nearly a century before the adoption of the Constitution prevailed with respect of private bills in Parliament. It levies a moderate fee upon the privilege of filing with a petition a bill or resolve as a step towards the enactment of specific legislation. The filing of such a bill or resolve is a matter well within the power of the Legislature to regulate, both under the general authority of Mass. Const., pt. 2nd, c. I, § I, art. IV (see *Stoughton v. Baker*, 4 Mass. 522, 529; *Commonwealth v. Alger*, 7 Cush. 53, 101), and under its inherent power to make rules for the governance of its proceedings. A distinction is made between a bill filed by a private person and a report required by law or a petition by any body politic, or any board or officer thereof in relation exclusively to the affairs of such body politic; which cannot be thought to be unreasonable.

It is not necessary and I do not now undertake to determine whether a fee can constitutionally be imposed upon the exercise merely of the right of petition as that right is properly understood. The present bill imposes a charge, not upon the right to file a petition alone, but upon the exercise of what is solely a privilege extended by the Legislature of filing with a petition a bill or resolve intended to be the first step towards the enacting of specific legislation.

In my opinion, the proposed bill, if enacted, would be constitutional.

CONSTITUTIONAL LAW — PROTECTION OF RESERVATIONS OF
WAYS NOT LAID OUT — DAMAGES.

A statute authorizing cities and towns to provide for the reservation for public use of ways not laid out, allowing landowners to recover damages for property taken, except damages for injury to any improvement constructed after the vote to reserve, and providing that the city or town may abandon the reservation, would be constitutional.

To the
House of Rep-
resentatives.
1925
April 11.

By order of the House of Representatives, dated March 23, 1925, my opinion is requested as to the constitutionality of the bill set out in House Document No. 504 of the current year, accompanying the petition of Philip Nichols, chairman of the committee on legislation of the Massachusetts Federation of Planning Boards, entitled "An Act to further protect locations reserved for public ways." This bill amends chapter 41 of the General Laws by inserting after section 79 four new sections and by revising section 81.

G. L., c. 41, §§ 73-79, authorize the appointment of boards of survey in cities and towns, provide for the preparation and filing of plans by such boards or subject to their approval for the laying out of ways, and forbid the construction of ways by public authority except in accordance with such plans. G. L., c. 41, § 80, and G. L., c. 82, § 37, provide for the establishment of building lines. G. L., c. 41, § 81, permits the recovery of damages sustained in certain cases.

The general scheme of the proposed new sections is to enable cities and towns by vote to provide for the reservation for public use of ways not already laid out as public ways, shown on plans prepared and filed by the board of survey or the planning board of such cities and towns, with elaborate provisions for notice and hearing, and to authorize the recovery of damages for property taken by such reservation. It is provided that damages shall not be recovered for injury caused by the laying out of such a way to any structure or improvement on land included therein constructed after the recording of such vote, that any person whose property has been taken by such reservation may recover the damages

caused thereby by petition for the assessment thereof under G. L., c. 79, but that thereafter at any time before entry of judgment the city or town may abandon the reservation of that part of the location which included the petitioner's land, and the petitioner shall have judgment only for his costs and the damages sustained by the temporary restriction upon his land, and that any other person whose property has been taken by an abandonment of the reservation may recover his damages in the same way. It is also provided that in cities and towns which have accepted the provisions of G. L., c. 41, § 80, or G. L., c. 82, § 37, the plans may include exterior building lines. The changes made in G. L., c. 41, § 81, are such as are required by the introduction of the new provisions proposed by the bill.

Statutes providing for the protection of plans for the laying out of public streets, by declaring that, when the projected streets were actually constructed, the owners of the land should not be compensated for buildings and other improvements erected within the limits of the projected streets after the date of the filing of the plan, were commonly enacted in the early years of the last century and for many years received general acquiescence, but later came to be held unconstitutional by the courts. *Moale v. Baltimore*, 5 Md. 314; *Baltimore v. Hook*, 62 Md. 371; *Forster v. Scott*, 136 N. Y. 577; *People v. Priest*, 206 N. Y. 274; *Kittinger v. Rossman*, 12 Del. Ch. 276; *State v. Carragan*, 36 N. J. L. 52. A similar statute in Massachusetts was held to be unconstitutional in *Edwards v. Bruorton*, 184 Mass. 529.

Evidently for the purpose of protecting the constitutional rights of landowners recognized by these cases, provision is made in the pending bill for the payment of compensation for property taken by virtue of its provisions. The provision made for compensation to any person whose property has been taken by reservation for public use seems to fulfil every constitutional requirement. As to every person whose property is included in the reservation a regulation of its use is imposed upon the owner in the nature of an

easement which constitutes a taking of his property. *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348; *Lexington v. Suburban Land Co.*, 235 Mass. 108; *cf. Opinion of the Justices*, 234 Mass. 597, 604–611. Compensation for the damages caused by such taking may be recovered in the way usually provided therefor. The measure of the damages according to the ordinary rule will be the diminution in the market value of the property caused by the taking. *Tyler v. Hudson*, 147 Mass. 609; *Boston Chamber of Commerce v. Boston*, 195 Mass. 338, 346–347; *Beals v. Brookline*, 245 Mass. 20; *Southern Pacific R.R. Co. v. San Francisco Savings Union*, 146 Cal. 290.

Provision is made giving to the city or town the right to abandon the reservation of a location after damages have been awarded against it, but before judgment. Such a provision, while not customary in Massachusetts, seems to have no element of unconstitutionality. There are in the decisions of our court instances in which under particular statutes an abandonment of a taking has been held to defeat a right to recover damages, although damages had already been awarded. *New Bedford v. County Commissioners*, 9 Gray, 346; *Corey v. Wrentham*, 164 Mass. 18. This rule has been commonly followed in other jurisdictions. *Garrison v. New York*, 21 Wall. 196; *Schreiber v. Chicago & Evanston R.R. Co.*, 115 Ill. 340; *Matter of Commissioners of Washington Park*, 56 N. Y. 144; Nichols on Eminent Domain, 2nd ed., § 417.

It is provided in section 79C (lines 91–95) that “any person whose property has been taken by the action of any city or town in abandoning the reservation of the whole or any part of a way under this section may recover the damages thereby caused.” It is a little difficult to understand how property can be *taken* by *abandoning* a reservation, *i.e.*, an easement in land created by the act of reservation. The intention seems to be to provide recompense for such loss as may be occasioned to persons the taking of whose property according to the original plan causes no damage,

but damage is sustained when the plan is modified by the abandonment. It might therefore be well to substitute the words "who has suffered loss" in place of the words "whose property has been taken," in the clause quoted. See *Munroe v. Woburn*, 220 Mass. 116; *Main v. County of Plymouth*, 223 Mass. 66.

For the reasons which I have given, it is my opinion that there is nothing unconstitutional in the proposed act.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATION —
WATER FURNISHED WITHOUT CHARGE TO A PRIVATE
CONCERN.

A bill providing that the city of Brockton may furnish, without charge, to the Sprague Neighborhood Center, a private corporation, a quantity of city water, to be used in a swimming pool, would, if enacted, be unconstitutional, as an expenditure of public money for an undertaking which is not exclusively under public control, under the provisions of Mass. Const. Amend. XLVI, § 2.

You request my opinion as to the constitutionality of House Bill No. 1260, entitled "An Act to enable the city of Brockton to furnish water to the Sprague Neighborhood Center without charge."

To the House
Committee on
Bills in the
Third Reading.
1925
April 11.

This bill provides that the city of Brockton is authorized to furnish to the Sprague Neighborhood Center, at the east side swimming pool, a quantity of city water each year without charge, said quantity not to exceed five hundred dollars in value in any one year, computed on the rates prevailing for city water in said city in the year in which such water is furnished.

The answer to your question depends upon the nature of the Sprague Neighborhood Center aforesaid. If it is a private organization not exclusively under public control, I am of the opinion that the bill is unconstitutional.

Mass. Const. Amend. XLVI, § 2, forbids, among other things, the use of public credit, public property or public funds for the purpose of founding, maintaining or aiding

“any . . . infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both.”

In *Lowell v. Boston*, 111 Mass. 454, after the great fire of 1872 which destroyed all the buildings in an important part of the city, it was decided that a statute authorizing the city to borrow money on bonds and lend it on mortgages to the owners of land whose buildings had been burned was unconstitutional, although the lending of such money would undoubtedly have promoted building and the transaction of business in the devastated area. The court said, at page 461:—

The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

This decision has governed all later decisions upon kindred questions in this Commonwealth. *Opinion of the Justices*, 155 Mass. 598; *Mead v. Acton*, 139 Mass. 341; *Kingman v. Brockton*, 153 Mass. 255; *Boston v. Treasurer and Receiver General*, 237 Mass. 403. The rule is the same in practically all jurisdictions in the United States.

In *Whittaker v. Salem*, 216 Mass. 483, it was held that a school committee had no power to vote a gratuity to the principal of a school to be paid during a leave of absence

granted for illness resulting from overwork. In that case the court said, at pages 484, 485: —

However meritorious the project may appear to be either in its practical or ethical or sentimental aspects, if it is in essence a gift to an individual rather than a furthering of the public interest, money raised by taxation cannot be appropriated for it.

See *Opinion of the Justices*, 204 Mass. 607; *Opinion of the Justices*, 211 Mass. 624; *Loan Association v. Topeka*, 20 Wall. 655.

In an opinion of the Attorney-General to the Senate committee on bills in the third reading (VI Op. Atty. Gen. 478), it was said: —

Public money cannot be spent for any purpose for which it would be unconstitutional to levy a tax. Taxes are levied in order to raise money for public purposes. They are collected by force if need be. The Legislature cannot appropriate, or authorize cities and towns to expend, public money for a private purpose. To do so would take the property of the taxpayer in violation of the rights guaranteed to him not only by the Constitution of this Commonwealth but also by the Fourteenth Amendment.

The law of this Commonwealth plainly prevents the expenditure of public money for any educational, charitable or religious undertaking which is not exclusively under public control. In the records of the Department of Corporations and Taxation it appears that the Sprague Neighborhood Center, Inc., of Brockton, is a private corporation organized in 1921 under G. L., c. 180, which provides for the formation of corporations for charitable and certain other purposes, and accordingly it is not a public institution under public control, within the meaning of the Constitution and laws of this Commonwealth. I am therefore of the opinion that House Bill No. 1260 would be unconstitutional, if enacted.

CONSTITUTIONAL LAW — TAX SALES — NATURE OF TITLE
ACQUIRED.

An act which provides that a purchaser of certain lands at a tax sale shall acquire an "absolute" title does not render the act unconstitutional, as the determination of the validity of the title is still left open to review by the courts.

To the
Governor.
1925
April 13.

You have submitted to me for examination and report House Bill No. 1236, entitled "An Act relative to the title acquired at sales of low valued lands taken or purchased by a city or town for non-payment of taxes or of any land so taken or purchased prior to July first, nineteen hundred and fifteen."

The object of this bill is, by amendment of existing statutes, to facilitate the acquisition of unencumbered titles by the purchasers at tax sales of two classes of lands. The classes of lands to which the bill is applicable are (1) lands taken or purchased by cities and towns prior to 1915 upon which taxes are still due, and (2) lands of "low value" taken or purchased by a city or town, for which special provision with regard to tax procedure and sale is provided by G. L., c. 60, §§ 79-81.

Although the object of the bill is attained by providing that the title of the purchaser at a tax sale of these classes of lands shall be "absolute" by virtue of the deed given by the tax collector, instead of becoming "absolute" after a decree of a court upon a petition for the foreclosure of the right of redemption, the bill is not in such terms as to violate the "due process" clause of the Fourteenth Amendment to the Constitution of the United States. The effect of the bill is that of a statute of limitations upon the right of redemption, for the exercise of which opportunity has been given under other provisions of the statute, before the sales provided for in the sections of this bill. The imposition of such limitations has been held to be within the power of a Legislature. *Wheeler v. Jackson*, 137 U. S. 245, 257; *Saranac Land & Timber Co. v. Comptroller of New York*, 177 U. S. 318; *Alexander v. Gordon*, 101 Fed. 91.

The term "absolute," as applied to the title taken by the purchaser at the tax sale, is used in relation to the estate acquired by the purchaser and has the effect of defining it as a fee simple or a title without encumbrances. The term "absolute" is not here used in such a sense as to give to the deed by which the estate is taken the nature of *conclusive* evidence of the validity of the purchaser's title. To give to the deed such *conclusive* effect would be an unconstitutional exercise of legislative authority. *Turner v. New York*, 168 U. S. 90; *Callanan v. Hurley*, 93 U. S. 387. The purchaser, under the terms of this bill, takes his title by virtue of the collector's deed, and the deed which by this bill the Legislature intends shall pass the title is, in its contemplation, a valid deed, valid both as to form and as to all essential prerequisites which are conditions precedent for its execution. The determination of such validity, when questioned, is still left by the bill within the province of the judiciary, and may be passed upon by the courts whenever the question of the validity of such a deed is presented to them by proper proceedings. By the terms of this bill the Legislature does not withdraw from the courts either their power to pass upon essential questions of law and fact necessarily involved in their passing judgment upon the ultimate question of the ownership of the land resulting from the statutory tax procedure, or the decision of the ultimate question itself as to the ownership of the land.

In my opinion, the bill is constitutional.

STATE RETIREMENT SYSTEM — PENSIONS FOR VETERANS —
“COMPENSATION.”

The word “compensation,” as used in G. L., c. 32, § 57, providing for retirement of veterans from active service at one-half the regular rate of compensation, upon certain conditions, means compensation actually paid in cash, and does not include additional benefits received, such as boarding and housing.

St. 1922, c. 341, § 2, providing for the addition of \$5 per week, in certain instances, as a non-cash allowance in addition to salary, does not alter the meaning of the word “compensation” as used in G. L., c. 32, § 57.

To the
Director of
Personnel.
1925
April 23.
—

You ask my opinion whether the meaning of the word “compensation,” as used in G. L., c. 32, §§ 49–60, and particularly in section 57, is affected by St. 1922, c. 341, § 2, amending section 3 of said chapter 32.

Chapter 32 relates to the subject of retirement systems and pensions. It contains provisions instituting retirement systems for employees in the service of the State, in the service of counties and in the service of cities and towns, and a retirement system for teachers. It contains also provisions for pensions to different classes of persons.

G. L., c. 32, § 3, as amended by St. 1922, c. 341, § 2, relates to the State retirement system and defines certain duties of the Board of Retirement under that system. It provides, in part:—

It (the board of retirement) shall determine the percentage of wages or salary that employees shall contribute to the fund, subject to the minimum and maximum percentages, and may classify employees for the purposes of the system and establish different rates of contribution for different classes within the prescribed limits. It (the board of retirement) shall add to the cash payment for regular services, in cases where an employee of a state institution receives a non-cash allowance to cover compensation in the form of full or complete boarding and housing in accordance with the practice in such state institution, an amount at the rate of five dollars per week, which amount added to said cash payment shall be the basis upon which annuity contributions shall be made; and the foregoing provision shall also apply in computing pensions based upon prior service.

G. L., c. 32, §§ 49–60, relate to pensions for veterans.
Section 57 is as follows:—

A veteran who has been in the service of the commonwealth, or of any county, city, town or district thereof, for a total period of ten years, may, upon petition to the retiring authority, be retired, in the discretion of said authority, from active service, at one half the regular rate of compensation paid to him at the time of retirement, and payable from the same source, if he is found by said authority to have become incapacitated for active service; provided, that he has a total income, from all sources, not exceeding five hundred dollars.

It appears from your communication and from information otherwise submitted that a veteran of the Spanish War, not a member of the Retirement Association, in the service of the Commonwealth at the State Farm, is eligible for retirement under G. L., c. 32, § 57, and that the employee has been receiving benefits from the Commonwealth in the nature of boarding and housing without charge, in addition to the regular salary or compensation paid to him. You ask me to advise you whether in retiring such employee under G. L., c. 32, § 57, the compensation there mentioned means the compensation actually paid him in cash, or whether it means that amount plus the five dollars per week as a non-cash allowance referred to in St. 1922, c. 341, § 2.

Rulings of the Attorney-General prior to the amendment of 1922 have held that the word "compensation," as used in the statute now appearing in G. L., c. 32, §§ 49-60, is limited to salaries and does not include such privileges as board and lodging. III Op. Atty. Gen. 128, 141; VI Op. Atty. Gen. 571. G. L., c. 32, § 3, as amended by St. 1922, c. 341, § 2, prescribes certain rules to be followed by the Board of Retirement in computing annuity contributions and pensions based upon prior service as a part of the State retirement system. It does not purport to affect the provisions contained in G. L., c. 32, §§ 49-60. The State retirement system and the system of pensions to veterans are entirely distinct. V. Op. Atty. Gen. 634.

It is my opinion that the meaning of the word "compensation," as used in sections 49 to 60, and particularly

in section 57, is not affected by the 1922 statute, and that it is to be interpreted in accordance with the prior rulings which I have referred to as including nothing but compensation actually paid in cash. (See VI Op. Atty. Gen. 629.)

INSURANCE — BROKERS' LICENSE FEES — PARTNERSHIP
AND CORPORATION LICENSES — VETERAN'S EXEMPTION.

The amount of the fee charged for an insurance broker's license to a partnership or corporation is not to be diminished because a partner or an officer is a veteran.

To the Com-
missioner of
Insurance.
1925
April 23.
— —

You have asked my opinion upon the following questions relative to the exemption claimed by veterans from the payment of fees for licenses as insurance brokers, particularly in connection with partnership and corporation licenses, under the provisions of G. L., c. 175: —

1. May the Commissioner lawfully issue an insurance broker's license to a partnership, under section 173, without requiring payment of the fee prescribed by section 14 by any member of the partnership who is a veteran described in section 167A?

2. May the Commissioner lawfully issue an insurance broker's license to a corporation, under section 174, without the payment of the fee prescribed by said section 14 by any officer of the corporation who is a veteran described in said section 167A?

3. Does the exemption granted by said section 167A apply only to individual brokers' licenses issued under sections 166 and 167 of said chapter 175?

The material provisions of chapter 175 are as follows: —

SECTION 166. The commissioner may, upon the payment of the fee prescribed by section fourteen, issue to any suitable person . . . a license to act as an insurance broker . . .

SECTION 167. The commissioner may . . . issue . . . licenses which limit the authority of the licensee . . . but in other respects the granting of such licenses . . . shall be governed by the laws relating to insurance brokers.

.

SECTION 14. He (the commissioner) shall collect . . . fees as follows:
 . . . for each license . . . to an insurance broker under section one hundred and sixty-six, twenty-five dollars; . . . to a special insurance broker under section one hundred and sixty-eight, twenty-five dollars; . . . to a partnership under section one hundred and seventy-three or to a corporation under section one hundred and seventy-four, the fees hereinbefore prescribed for like licenses issued to individuals under said section . . . one hundred and sixty-six . . . for each . . . partner or officer to be covered by the license. . . .

SECTION 167A. No fee for a license issued under section one hundred and sixty-six or one hundred and sixty-seven shall be required of any soldier . . .

PARTNERSHIPS.

SECTION 173. The licenses described in sections . . . one hundred and sixty-six, one hundred and sixty-seven . . . may, upon payment of the fees prescribed by section fourteen, be issued to partnerships on the conditions specified in and subject to said sections, except as otherwise provided herein. . . .

CORPORATIONS.

SECTION 174. The licenses described in sections . . . one hundred and sixty-six, one hundred and sixty-seven . . . may, upon payment of the fees prescribed by section fourteen, be issued to any corporation . . . Such license, together with the corporation and officers of the corporation named in the license, shall be subject to said sections, except as otherwise provided herein.

The substance of section 167A was formerly incorporated in section 166, and read: "No fee for a license issued hereunder." By the amendment made by St. 1924, c. 450, it has been taken out of section 166 and made to apply to both sections 166 and 167, reading: "No fee for a license issued under sections 166 and 167." The exemption is not specifically referred to elsewhere in the statute, and there is nothing in section 167A to indicate that it is intended to apply to any other licenses than those issued under sections 166 and 167. A partnership license, provided for in section 173, is not issued "under" section 166 or 167, though provision is made that licenses described in those sections may be granted to partnerships; the partnership

license is issued "under" or by authority of section 173. The license, when issued, is not the license of any individual and cannot be used for the prosecution of the business of any individual. The fee which is to be paid under section 14 is a single fee for the license of a partnership; though its amount is determined by the number of individuals included in the firm, the fee is not assessed upon the individuals as such. Much the same considerations apply to the licenses of corporations under section 174. A veteran who is a member of such a partnership, or an officer of such a corporation, is not required himself, in his individual capacity, to pay a fee, and derives no individual benefit peculiar to himself from the particular license which determines with the cessation of the firm's life or the ending of the corporation's existence, in the case of a corporation license.

There is nothing in the nature of the relation of a member of a firm to a partnership nor of a corporate officer to a corporation which would necessarily indicate an intent on the part of the Legislature, in framing such a section as 173, to reduce the amount of the fee required from the partnership or corporation because one of the partners or officers was a "veteran."

A situation possibly involving some apparent hardship is presented when, as I am informed has been the case in certain instances which have been brought to your attention, all the members of the partnership are veterans, but there is nothing in the language of the statute which indicates an intention on the part of the Legislature to differentiate between partnerships by reason of the status as veterans or civilians of the individual members of a firm.

I am of the opinion that the amount of the fee for the issuance of a broker's license to a partnership or a corporation, under G. L., c. 175, § 14, is not to be diminished from the prescribed amount because one or more of the partners, in the first instance, or one or more of the officers of the corporation, in the second, may be a "veteran."

This answers the first and the second of your questions, and the third I answer in the affirmative. I do not pass upon the question of whether St. 1925, c. 124, when in force, will in this respect affect the construction of G. L., c. 175, § 14.

REGISTRAR OF MOTOR VEHICLES — "SUBSEQUENT CONVICTION."

A defendant cannot be held to have been "subsequently convicted" unless the offence which is the basis of the later conviction was committed after the offence for which he was previously convicted.

A person who violates several provisions of G. L., c. 90, § 24, as amended, all arising out of substantially the same act, cannot be held to have been subsequently convicted of any of the violations, even though the convictions occur at different times.

You state that a person was in a district court charged on three counts with violation of three offences enumerated in G. L., c. 90, § 24, as amended; that the three charges arose out of one drive; that he was acquitted on one count and found guilty on the second count and fined, and found guilty on the third count and sentenced to imprisonment; that he paid the fine imposed on the second count and appealed from the judgment of the court on the third count; and that subsequently there was a final conviction on the third count in the Superior Court. You request my opinion as to whether the conviction upon the third count is a "subsequent conviction," within the meaning of G. L., c. 90, § 24, as amended, which would prohibit the Registrar of Motor Vehicles from restoring the license of the defendant until one year after the date of that conviction.

The pertinent provisions of G. L., c. 90, § 24, as amended by St. 1924; c. 183, and by St. 1925, c. 201, § 3, are as follows:—

. . . A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event and shall, unless the court or magistrate recommends otherwise, revoke immediately the license of the person so convicted, and no appeal from

To the Com-
missioner of
Public Works.
1925
April 23.

the judgment shall operate to stay the revocation of the license. . . . The registrar . . . after an investigation or upon hearing may issue a new license to a person convicted in any court; provided, that no new license shall be issued by the registrar . . . to any person convicted of violating any other provision of this section until sixty days after the date of final conviction, if for a first offence, or one year after the date of any subsequent conviction . . .

The question is whether a defendant who almost simultaneously commits several violations of law, all arising out of substantially the same act, and who is finally convicted at different times of the offences charged is "subsequently convicted" within the purview of the statute.

The Supreme Judicial Court of this Commonwealth has held that where a statute requires a more severe penalty for a second or subsequent conviction, the offence upon which the defendant is subsequently convicted, to justify the imposition of the greater penalty, must have been committed after the commission of the prior offence. *Stevens v. Commonwealth*, 4 Met. 360; *Commonwealth v. Daley*, 4 Gray, 209; *Commonwealth v. Mott*, 21 Pick. 492; *Commonwealth v. Richardson*, 175 Mass. 202, and cases there cited. In *Graham v. West Virginia*, 224 U. S. 616, 623, this view was clearly intimated. It is supported by decisions in other States. *People v. Butler*, 3 Cowen (N. Y.), 347; *Wood v. People*, 53 N. Y. 511; *Commonwealth v. McDermott*, 224 Penn. 363; *Morgan v. Commonwealth*, 170 Ky. 400; *Brown v. Commonwealth*, 100 Ky. 127; *Huyser v. Commonwealth*, 25 Ky. Law Rep. 608; *Rand v. Commonwealth*, 9 Gratt. (Va.) 738; *Long v. State*, 36 Tex. 6; *Kinney v. State*, 45 Tex. Crim. Rep. 500.

In *Stevens v. Commonwealth*, 4 Met. 360, 364, the court, in considering a statute which required that a defendant convicted of three distinct larcenies be punished as a common and notorious thief, held that a defendant who by one act, done at one time, stole the property of three different persons and was indicted in three counts for larceny and convicted, was not guilty of three distinct larcenies.

In *Commonwealth v. Mott*, 21 Pick. 492, and in *Commonwealth v. Daley*, 4 Gray, 209, the court held that where the statute provided for a greater penalty upon a second conviction, it was incumbent upon the Commonwealth to prove that the second offence was committed subsequently to the prior conviction.

In *Commonwealth v. Richardson*, 175 Mass. 202, 207, doubt was cast upon the doctrine that to warrant the imposition of the greater penalty the second offence must have been committed after the prior *conviction* as well as after the commission of the prior offence, but the court apparently approved of the view that the second offence must have been committed subsequently to the commission of the prior offence.

In view of the foregoing authorities it seems clear that in Massachusetts a defendant cannot be held to have been "subsequently convicted" unless the offence which is the basis of his subsequent conviction was committed after the commission of the offence for which he was previously convicted. I am of the opinion that a person who almost simultaneously violates several provisions of G. L., c. 90, § 24, as amended, all arising out of substantially the same act, cannot be held to have been subsequently convicted of any of the violations, even though the convictions occur at different periods of time.

In my opinion, therefore, the conviction of the person referred to upon the third count of the complaint was not a subsequent conviction within the meaning of the act.

You further state that the defendant loaned his license to another person merely for the purpose of misleading the inspector as to who had been driving the car, and you inquire whether that act constituted a violation of law. In view of the fact that the defendant was finally convicted of "loaning his license to operate motor vehicles to be used by another person," I do not deem it proper to undertake to review the judgment of the court.

CONSTITUTIONAL LAW — TAXATION — NATIONAL BANKS.

An act relative to taxation of banks and trust companies, subsequently enacted as St. 1925, c. 343, is constitutional.

To the
Governor.
1925
May 1.

You have submitted to me for examination and report House Bill No. 1250, entitled "An Act relative to taxation of banks and trust companies."

Among the alternative methods of taxing national banking associations which are now authorized by U. S. Rev. Sts. § 5219 (as amended by Act of March 4, 1923), is the taxation of "the income of such associations." If this method is adopted the following conditions must, by the terms of that statute, be complied with: —

(c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing state upon the net income of mercantile, manufacturing and business corporations doing business within its limits.

The purpose of the present bill is to levy upon the income of national banking associations a tax which shall comply with the conditions prescribed by Federal authority; to subject to a similar tax the income of certain other banks, banking associations or trust companies therein referred to; and to harmonize this comprehensive and to some extent novel plan of taxation with other and related provisions of the tax law.

I have examined this bill with the care which its importance merits. Much of it has to do with administrative provisions, and with bringing the general body of the taxation statutes into alignment with the fundamental changes which it effects. These subordinate provisions do not seem to be deficient in form or substance, at least if the general scheme and main provisions of the bill are valid.

As to the dominant features of the statute, it is to be borne in mind that there has been as yet no judicial exposition

of the amendments by which U. S. Rev. Sts. § 5219 has been brought into its present form; and that the problem of taxing the income of national banks and at the same time preserving the system of taxation of corporations hitherto existing in this Commonwealth is rendered more difficult by the fact that the tax imposed by G. L., c. 63, §§ 32 and 39, is measured in part by income and in part by the value of the corporate excess. I have observed and weighed some aspects of this bill which might give rise to differences of opinion. It would perhaps be difficult to draft a bill which should meet the ends for which this legislation is intended and which at the same time should avoid from its inception all reasonable doubts. Viewing the bill as a whole, however, and in the light of its history (as to which see House Documents No. 1441 of 1923 and No. 233 of 1925), I am of the opinion that, if enacted, it will be held constitutional.

COUNTIES — FINANCIAL YEAR — PAYMENTS BY TREASURER.

A county treasurer, after the close of a financial year, may pay bills as to which there has been a "special appropriation." He may not pay bills due in connection with the general annual appropriation for the past financial year.

You have requested my opinion upon the following matter:—

To the Com-
missioner of
Corporations
and Taxation.
1925
May 7.

In order that the Director of Accounts may be guided in the approval of county treasurers' books, I would especially ask your opinion as to whether a county treasurer may, after the closing of the books on January 10 of any year as required by statute, pay bills chargeable to the various accounts that were not submitted on or before January 10 as required by statute.

.

The question might be made specific by inquiring whether a bill which was legally incurred but not presented can be paid in a subsequent year and charged to the appropriation made for that year; or if bills can be so paid in cases where there were insufficient funds to meet them if presented.

I would like to be advised whether such bills can be held and paid from an appropriation specifically made for the carrying on of the work of the county for the succeeding year.

G. L., c. 35, § 16, provides: —

The financial year of each county shall be the calendar year, but the treasurer shall, until January tenth, enter in his books the items for the payment of bills incurred and salaries earned during the previous year. Immediately after January first, he shall pay to every officer in his county any salary balance remaining due.

As was said in an opinion of one of my predecessors in office given to the Director of Accounts on July 30, 1920 —

The section provides, in effect, that on the tenth day of January the county treasurer shall close his books for the preceding year. . . . This provision merely establishes rules of bookkeeping and does not make the validity of any claim against the county commissioners contingent upon presentation before the books are closed, although . . . the validity of a claim may not carry authority to pay it. . . . But the county treasurer has no authority to pay even a valid claim unless money has been appropriated therefor.

G. L., c. 35, § 29, provides: —

The expenditure of money by the several counties shall be in accordance with annual appropriations of the general court, specifying as separate appropriations the several items of expenditure, as prescribed by the director of accounts. At the closing of the county treasurer's books on January tenth, the balance to the credit of each annual appropriation shall become a part of the general unappropriated balance in the county treasury; but no special appropriation shall lapse until the work for which it was made has been completed, the bills paid and the account closed.

At the close of a financial year nothing remains of the general appropriations of the previous year, as such, because by the terms of section 29 "the balance to the credit of each annual appropriation shall become a part of the general unappropriated balance in the county treasury." The only class of bills whose payment is authorized from this

unappropriated balance is that relating to payments named in section 34, which concern expenditures for liabilities incurred after December 31st of any year and before the regular appropriations for the next succeeding year have been made by the Legislature. A valid bill for an expenditure incurred during such a period may be paid from the unappropriated balance after the books are closed on January 10th, if the annual appropriation has not then been made by the General Court.

As to that class of valid bills due in connection with matters for which there has been a "special appropriation," the treasurer's duty is plain. By section 29 the special appropriation is not to lapse at the close of the financial year and is available for the payment of all bills relative to the work covered by the appropriation, irrespective of the date of their presentation, and the county treasurer may pay such bills from the special appropriation to which they may be properly allocated.

When, however, bills rendered for payment after the close of the financial year are for money due in connection with matters covered by the general annual appropriations, there appears to be no fund from which the treasurer can pay them, in the absence of a special item for expenditure in the annual appropriations specifically providing for the payment of outstanding bills relating to liability incurred before the beginning of the current year.

The customary form in which bills for the appropriation of money for the general expenditures of the counties are made provides,—"The following sums are hereby appropriated for the counties hereinafter specified for the year . . .," and the current year is designated. It is also customary for the Legislature to insert in such bills an item of expenditure of the general annual appropriation in the following words: "For miscellaneous and contingent expenses of the current year, . . ."

Bills contracted for previous years cannot be paid out of funds appropriated for the current year, and so designated.

The expense involved in their payment is an expense of the year in which they were contracted, not of the subsequent year in which they are presented for payment. It is now a common practice for the Legislature to insert in appropriation bills for the counties a clause reading as follows: "For bills of the previous year for miscellaneous and contingent expenses, . . ." Such a provision provides for outstanding bills in a convenient manner and makes unnecessary a practice, which you inform me has existed, of paying bills of previous years from an appropriation designated for "miscellaneous and contingent expenses of the current year," a practice not warranted as a matter of law.

The word "contingent" itself commonly implies the idea of futurity, and as used in legislative acts in relation to expenses, either alone or coupled with the word "miscellaneous," has a well-recognized meaning and refers to minor disbursements incidental to the carrying out of general projects which cannot well be foreseen. When so used its reference is to future, not to past, expenses, unless expressly stated in the enactment to be applicable to liabilities previously incurred. *People v. Village of Yonkers*, 39 Barb. (N. Y.) 266; *Dunwoody v. United States*, 22 Ct. Claims, 269, 280; *School District No. 3 v. Western Tube Co.*, 13 Wy. 304; *Mander v. Coleman*, 95 N. Y. Sup. 696.

In my opinion, with the exception of the two classes referred to above, bills not presented to a county treasurer until after the closing of his books for the financial year may not be paid from an appropriation specifically made for carrying on the work of the county for the succeeding year.

PUBLIC WAREHOUSEMEN — REVOCATION OF LICENSE ON DISCONTINUANCE OF BUSINESS.

When a public warehouseman discontinues business and cannot be located, his license may be revoked. The Secretary of the Commonwealth may proceed on the bond to recover the expense of publishing notice of revocation.

In regard to the discontinuance of business by certain public warehousemen licensed under the provisions of G. L., c. 105, you request, by direction of His Excellency the Governor, my opinion on the following questions: —

To the
Governor.
1925
May 15.

1. Where the principal discontinues business and cannot be located, may the Governor and Council revoke his license?

2. If the answer to question 1 is "Yes," may the Secretary of the Commonwealth thereafter be directed by the Governor to give public notice of such termination of the license, and may the Secretary of the Commonwealth proceed, under section 3 of said chapter 105, to recover on the bond of said warehouseman for the expense of the publication required?

I answer question 1 in the affirmative. G. L., c. 105, § 1, provides for the licensing of "suitable persons, or corporations established under the laws of, and having their places of business within, the commonwealth, to be public warehousemen." The words of the original act (St. 1860, c. 206) were, — "may license in any city or town in the Commonwealth." G. L., c. 105, § 6, provides for publication of a discontinuance of a license in a newspaper published "in the county or town where the warehouse is located." It seems clear, therefore, that where a licensee has discontinued his business at the place where he has maintained it, and cannot be located, the licensing power has authority to revoke the license.

As to the first part of your second question, it is expressly provided by G. L., c. 105, § 6, that the Secretary of the Commonwealth publish notice of the discontinuance of a license. This section reads as follows: —

The state secretary shall, at the expense of each warehouseman, give notice of his license and qualification, of the amount of the bond

given by him and also of the discontinuance of his license by publishing the same for not less than ten days in one or more newspapers, if any, published in the county or town where the warehouse is located; otherwise, in one or more newspapers published in Boston.

The second part of your second question I also answer in the affirmative. Section 6, above quoted, provides that the publication shall be at the expense of the warehouseman. This provision imposes upon a warehouseman who has applied for and received a license a duty to pay such expense. The bond given to the Commonwealth by warehousemen, under section 1 of said chapter, is "for the faithful performance of their duties."

METROPOLITAN DISTRICT COMMISSION — AUTHORITY TO
CONSTRUCT COTTAGE FARM BRIDGE.

The authority given to the Metropolitan District Commission by St. 1921, c. 497, to construct the Cottage Farm Bridge is not subject to the approval of the Division of Waterways and Public Lands.

To the Com-
missioner of
Public Works,
1925
May 15.

You request my opinion as to whether the construction by the Metropolitan District Commission of the Cottage Farm Bridge, so called, under St. 1921, c. 497, as amended by St. 1924, c. 416, requires the approval of the Division of Waterways and Public Lands.

I answer in the negative. St. 1921, c. 497, § 1, provides that the Metropolitan District Commission "is hereby authorized and directed . . . to construct" the bridge in question. There is nothing in the act or in the amendment of 1924 which in any way limits or qualifies the authorization and direction as above quoted.

It has been suggested that the authorization and direction given to the Metropolitan District Commission by the 1921 statute, though absolute in terms, is nevertheless subject to the provisions of G. L., c. 91, § 20, which section reads as follows:—

Whoever is authorized by the general court to build over tide waters a bridge, wharf, pier or dam, to fill flats or drive piles below high water mark, or to build any structures in the Connecticut river, or in the non-tidal part of the Merrimack river, or to build or extend any structure or to do any other work mentioned in the preceding section in, over or upon the waters of any great pond, shall not commence such work until he has given written notice thereof to the division and submitted plans of any proposed structure, the flats to be filled, and the manner in which the work is to be performed, and the same has been approved in writing by the division, which may alter such plans and prescribe any direction, limits and manner of doing the work consistent with the legislative grant. Such works shall be supervised by the division.

In my opinion, however, this section is inapplicable. The Charles River Basin is not, as I understand it, in fact tide water. Furthermore, the Legislature directed that the Charles River Dam should be "sufficiently high to hold back all tides" (St. 1903, c. 465, § 3). Apart from this, moreover, it seems that section 20, above quoted, would not be held to apply to the Metropolitan District Commission, a public agency, authorized and directed by the statute to do the work in question. *Attorney General v. City of Cambridge*, 119 Mass. 518; *Teasdale v. Newell & Snowling Construction Co.*, 192 Mass. 440.

REGISTRAR OF MOTOR VEHICLES — REVOCATION OF REGISTRATION OR LICENSE — "IMPROPER PERSON."

The Registrar of Motor Vehicles may suspend or revoke any certificate or license issued under G. L., c. 90, for any cause which he deems sufficient.

He may not invoke this power in an arbitrary or unreasonable manner or in bad faith.

In determining whether a license or certificate should be suspended or revoked, the Registrar is not limited to a consideration of the violation of motor vehicle laws or of the right of the public to use public ways in safety.

You request my opinion as to whether the Registrar of Motor Vehicles has the power to suspend or revoke any certificate of registration or license issued to a person who, in the Registrar's opinion, is an improper person to hold such certificate or license by reason of the use by such

To the Commissioner of
Public Works.
1925
May 22.

person of a motor vehicle in the commission of crimes other than the violation of motor vehicle laws.

G. L., c. 90, § 22, provides, in part: —

The registrar may suspend or revoke any certificate of registration or any license issued under this chapter, after due hearing, *for any cause which he may deem sufficient*, and he may suspend the license of any operator or chauffeur or the certificate of registration of any motor cycle in his discretion and without a hearing, and may order the license or registration certificate to be delivered to him, whenever he has reason to believe that the holder thereof is an improper or incompetent person to operate motor vehicles, or is operating improperly or so as to endanger the public. . . .

The Registrar thus, by the specific terms of the statute, has the power to suspend or revoke any certificate or license issued under chapter 90 for *any* cause which he deems sufficient. He may not invoke this power in an arbitrary or unreasonable manner or in bad faith, but within these limits the power is unlimited.

In the case of *Glass v. State Board of Public Roads*, 44 R. I. 54, one of the issues was whether the power of the board to revoke licenses under a statute similar to ours (see General Laws of Rhode Island, 1923, c. 98, §§ 5 and 6) was confined to cases where the right of the public to use the highway in safety was involved. The Supreme Court of Rhode Island said: —

We do not think that the power of the Board is thus limited. The intent of the act is to secure the safety of the public in the use of the public highways, and also, we think, to protect the public by preventing the use of the automobile for purposes and in ways that are injurious to the community. The use of the automobile today by the criminal class is a menace to the community. By its use the commission of crime is made easier and the apprehension of the criminal more difficult. It is conceded that if the automobile is used in the commission of crime the license of the operator may properly be revoked. . . . We think that a thief should not be permitted to operate an automobile, for as long as his character remains unchanged, the danger of his making unlawful use of the automobile is such that the privilege should be denied to him. . . . We think the Board is warranted in revoking or refusing to grant

a license whenever in good faith and in the exercise of a reasonable discretion they find that the probable use of the automobile by the licensee would be a detriment to the public safety, welfare or morals.

While that opinion is not binding upon administrative officers in Massachusetts or upon our courts, I am of the opinion that the view therein expressed is sound and would be approved by our courts. In my opinion, therefore, the Registrar, in determining whether a license or certificate of registration should be suspended or revoked, is not limited merely to a consideration of the violation of motor vehicle laws or of the right of the public to use public ways in safety.

INTERSTATE RENDITION — DESERTION, ABANDONMENT AND NON-SUPPORT CASES — COST — RESULTS OF PROSECUTION.

The average cost of requisition in desertion, non-support and abandonment cases was \$110.45. No defendant was acquitted.

Families of fugitives were directly benefited in more than eighty per cent of the cases.

Poor relief by communities has been saved. Deterrent effect upon potential offenders.

You have requested me to advise you as to the approximate cost of interstate rendition for the crimes of desertion, abandonment or non-support, the final disposition of such cases and the extent to which the families of fugitives have been benefited by such proceedings. For this purpose I have analyzed 69 requisitions which were issued by Your Excellency and by your predecessor, during the preceding six months.

Requisitions were issued upon the governors of 13 States; 33 upon New York, 9 upon Pennsylvania, 6 upon Florida, 4 upon California, 4 upon New Jersey, 4 upon Illinois, 2 upon Vermont, 2 upon Maine, and one upon each of the following States, — Connecticut, Ohio, Alabama, Tennessee and Texas. All of the requisitions, with the exception of that upon the governor of Texas, were honored.

To the
Governor.
1925
May 27.

The total cost of the interstate rendition proceedings in the 69 cases was \$7,621.29, or an average cost of \$110.45 for each case. In no case was a defendant acquitted. Seven defendants were committed to houses of correction for terms ranging from three to nine months. Three defendants, after being placed upon probation and ordered to make payments to their families, fled from the Commonwealth and have not since been apprehended. One defendant was committed to the Boston State Hospital for observation but escaped therefrom and has not been apprehended.

In the remaining 58 cases the families of the fugitives were directly benefited. In at least 13 of the 58 cases a reconciliation was effected and the defendants are now living with and supporting their families. In the remaining 45 of the 58 cases where the families were directly benefited, and in some of the 13 cases where a reconciliation has been effected, the court ordered the defendant to make weekly payments to the probation officer for the support of the family, or to the family directly, of amounts ranging from \$3 to \$30 per week, the average order being from \$10 to \$12 per week. In 10 cases bonds or bank accounts averaging \$1,000 each were filed or deposited with the probation officer to insure the enforcement of the court's order relative to payments. In the counties of Suffolk and Middlesex, wherever possible and desirable from the viewpoint of the welfare of the family, the defendants, in addition, have been ordered to pay all of the expenses of the interstate rendition proceedings. Such expenses were fully paid, or are being paid, in 27 cases.

Aside from the foregoing benefits there are two additional benefits to the community derived from such proceedings. One is the saving to the community of poor relief, which, in many cases, until the apprehension and return of the fugitive, was given by the community to the family of the fugitive. The second benefit is the deterrent effect upon would-be or potential family deserters. The fact that the

various district attorneys endeavor to secure the return from various parts of the country of men who abandon or fail to support their families, undoubtedly deters other persons from committing the same crime.

It seems to me that the analysis of the expenses in the 69 cases and of the results derived from the proceedings in those cases fully justifies the issuance of requisitions for such crimes. Manifestly, district attorneys should exercise a sound judgment as to the cases in which they request Your Excellency to issue requisitions upon the governors of other States. Unless the facts indicate that a direct benefit will be obtained from the return of a fugitive, or unless there has been a default or a wilful defiance of an order of the court, district attorneys, in my opinion, should not request requisitions where the expense involved is substantial.

BOARD OF REGISTRATION IN OPTOMETRY — REGISTERED OPTOMETRIST — STUDENTS — EXAMINATION.

The term "registered optometrist," as used in G. L., c. 112, § 68, applies only to optometrists registered in Massachusetts.

Under G. L., c. 112, § 67, the Board of Registration in Optometry may properly rule that only those students studying under an optometrist duly registered in Massachusetts are entitled to receive the student certificate of fact referred to in section 68, and to be examined as provided in said section.

You request my opinion as to whether a person studying under a registered optometrist of another State is eligible to take an examination in this Commonwealth for registration as an optometrist, and whether or not the Board of Registration in Optometry has a right to rule that only those students studying under a registered optometrist holding a license in Massachusetts are so eligible.

The law of this Commonwealth containing the requirements for examination and registration of optometrists is found in G. L., c. 112, § 68, the relevant portion of which is as follows:—

To the
Board of
Registration
in Optometry.
1925
May 27.

Every applicant for examination shall present satisfactory evidence, in the form of affidavits properly sworn to, that he is over twenty-one, of good moral character, that he has studied the subjects herein prescribed for at least three years in a registered optometrist's office or has graduated from a school of optometry, approved by the board, . . . Students entering upon the study of optometry in a registered optometrist's office shall file with the board an application for, and upon payment of one dollar shall receive, a student certificate of fact, and only students so registered shall be entitled to take an examination for registration without attendance at a school of optometry as hereinbefore required.

The answer to your question depends upon the meaning of the words "registered optometrist," as used in the above section. It is significant that the Legislature has laid down certain requirements for registered optometrists, among which are — that every registered optometrist shall, annually, before February first, pay to the board a license fee of two dollars (§ 69), and shall cause his certificate of registration to be recorded in the office of the clerk of the town where he principally carries on the practice of optometry; and if he removes his principal office from one town to another in the Commonwealth, he shall, before engaging in practice in such other town, notify the board in writing of the place where he is to engage in practice and obtain from the clerk of the town where his certificate is recorded a certified copy thereof and file the same with the clerk of such other town (§ 70). Every registered optometrist is further required to display his certificate of registration in a conspicuous place in the principal office wherein he practices optometry, and shall, whenever so required, exhibit it to the board or its authorized representative; and whenever practicing optometry outside of or away from his principal office or place of business, he is required to deliver to each customer or person fitted with glasses by him a memorandum of purchase, containing his signature, home post office address and the number of his certificate of registration (§ 70).

Obviously, these strict requirements cannot apply to or

be demanded of optometrists registered in other States but not in this Commonwealth. Such optometrists are outside the supervision and control of the Massachusetts Board of Registration in Optometry. There is no definite standard available to said board by which the qualifications of such an optometrist can be measured or controlled. If, however, a candidate for examination is a graduate from a school of optometry, the statute expressly sets forth the conditions under which such graduate may be examined in this Commonwealth, namely, that such school must be approved by the board, must maintain a course of study of not less than two years, with a minimum requirement of one thousand attendance hours, and further, that the applicant must have graduated from a high school approved by the board, or have had a preliminary education equivalent to at least four years in a public high school, or submit to a preliminary examination by the board.

Even a person to whom a certificate of registration has been issued after examination by a board of registration in optometry in any other State cannot be given a certificate of registration in this Commonwealth without examination, unless, in the opinion of the board, the requirements for registration in such State are equivalent to those of this Commonwealth, and provided further, that such State accords a like privilege to holders of certificates of registration issued in this Commonwealth, and that the applicant has not previously failed to pass the examination required in this Commonwealth (§ 68).

In view of these strict rules regulating in the public interest the practice of optometry in this Commonwealth, and in the absence of express language to the contrary, it is my opinion that the Legislature intended the term "registered optometrist," as used in this connection, to apply only to optometrists registered in Massachusetts under the laws thereof.

G. L., c. 112, § 67, authorizes the Board of Registration in Optometry to make necessary rules and regulations to

carry into effect the statutes relating to optometry, namely, G. L., c. 13, §§ 16-18, and G. L., c. 112, §§ 66-73. Under this authority and in view of the language of the statutes above referred to, it is my opinion that said board has a right to rule that only those students studying under an optometrist duly registered in Massachusetts are entitled to receive the student certificate of fact referred to in section 68, and to be examined as provided in said section.

INSURANCE — CONTRACTS MADE IN A FOREIGN STATE.

The provisions of G. L., c. 175, §§ 99, 152 and 157, as amended, are not applicable to foreign insurance companies with relation to contracts made by them in another State in conformity to the laws of the foreign jurisdiction.

To the Com-
missioner of
Insurance.
1925
June 2.

You have requested my opinion regarding the construction and application of certain sections of G. L., c. 175, as amended, in relation to two matters connected with the business of foreign insurance companies, as follows:—

Two matters have come to my attention involving the application and construction of these provisions:—

I. A certain foreign company is duly licensed to transact the business specified in the sixth clause of section 47 of said chapter 175 but is not licensed to transact business under the twelfth clause. It has issued in its home state a policy of burglary insurance to a resident of this state, covering property located here, which was delivered direct to the insured. The contract was made in the home state and not in this Commonwealth through a duly licensed resident agent.

II. A certain foreign company duly licensed to transact fire insurance issues a policy of fire insurance in its home state to a resident of Massachusetts covering property situated here. The policy is not in the standard form prescribed by said section 99. The contract was consummated in the home state and not here through a duly licensed resident agent.

I respectfully request your opinion upon the following questions:—

1. Do the facts stated in I disclose a failure of the company to comply with said section 152?
2. Do the facts stated in I or II disclose a failure of the company to comply with said section 157?

3. Do the facts stated in II disclose a failure of the company to comply with said section 99?

4. Does the provision of said section 152, forbidding a foreign company from transacting a class of business not specified in its license, apply only to the making of contracts in this Commonwealth, or does said provision prohibit a duly licensed foreign company, as a condition of its license, from making in another state a contract of insurance on property or interests in this Commonwealth of a class which it is not licensed to transact in this Commonwealth?

5. Does said section 157 apply only to contracts of insurance of the classes specified in the license of a foreign company, or does said section 157 prohibit a duly licensed foreign company, as a condition of its license, from making in another state a contract of insurance with a resident of this Commonwealth on property or interest therein of a class which it is not licensed to transact in this Commonwealth?

6. Does said section 99 apply only to contracts of fire insurance made in this Commonwealth on property or interests therein, or does said section 99 prohibit a duly licensed foreign company, as a condition of its license, from using a fire policy not in the form prescribed by said section 99 in respect to contracts of fire insurance made in another state on property or interests in this Commonwealth?

I assume from your statements that, as a matter of fact, in each of the two instances which you have set forth the contract of insurance was made outside the Commonwealth, no action in connection therewith being performed here, in a State wherein the insuring company had its principal place of business, and that the contract was not illegal under the laws of such State.

It is well settled that although the States have broad powers to impose conditions upon foreign insurance companies who seek to do business within their borders, no State may enact statutes which forbid or penalize the making of contracts of insurance outside its own territory, even if the insured be one of its own citizens or the subject-matter of the contract be within its own confines. Statutes which directly or indirectly seek to prohibit or penalize the formation of such contracts have been held uniformly to be within the prohibition of the Fourteenth Amendment of the Constitution of the United States. *Stone v. Old*

Colony St. Ry. Co., 212 Mass. 459; *Allgeyer v. Louisiana*, 165 U. S. 578; *New York Life Ins. Co. v. Dodge*, 246 U. S. 357; *Stone v. Penn Yan etc. Ry.*, 197 N. Y. 279; *State v. Conn. Mut. Life Ins. Co.*, 106 Tenn. 282; *Hyatt v. Blackwell Lumber Co.*, 31 Ida. 452.

To construe the foregoing sections of G. L., c. 175, as amended, as applicable to the acts of foreign insurance companies in making contracts with citizens of this Commonwealth in other States, would be unwarranted. See III Op. Atty. Gen. 222.

I answer the first three questions contained in your communication in the negative.

I answer the fourth question to the effect that G. L., c. 175, § 152, as amended, does not prohibit a licensed foreign insurance company, as a condition of its license, from making in another State a contract of insurance on property or interests in this Commonwealth of a kind as to which it is not licensed to transact business in Massachusetts.

I answer your fifth question to the effect that G. L., c. 175, § 157, as amended, applies to contracts of insurance of the kinds specified in the license of a foreign insurance company made within the Commonwealth.

I answer your sixth question to the effect that G. L., c. 175, § 99, applies only to contracts of fire insurance made in this Commonwealth.

METROPOLITAN DISTRICT COMMISSION — TOWN OF CLINTON — COST OF WATER — PIPE LINE RENTAL.

Under St. 1923, c. 348, the town of Clinton may take, without charge, water from any available pipe line leading from the Wachusett Reservoir.

No charge may be made for use of a pipe line which would indirectly be, or result in making, a charge for water.

Cost of water is in part determined by computing various items of expenditure necessary to conserve and make water available. Included in such items are interest upon capital investment, depreciation and cost of operation and maintenance.

The Commission may not charge an annual rental for use of a pipe line.

The Town of Clinton should pay expenses incurred as a result of the use of a pipe line by it which would not otherwise have been incurred.

You request my opinion as to whether, under the provisions of St. 1923, c. 348, the Commission may charge the town of Clinton, in the form of an annual rental or in any other way, for the use of a pipe line which now runs to the Lancaster Mills in Clinton and through which water is delivered to the mills, in compliance with St. 1895, c. 488, § 4. You have orally stated to me that this pipe line is an available pipe line, within the meaning of St. 1923, c. 348. You further state that the Commission voted to authorize the town to use that pipe line on certain conditions, one of which was the payment of an annual rental by the town for the use of the pipe line.

St. 1923, c. 348, provides, in part: —

The town of Clinton is hereby authorized to take water . . . from the Wachusett reservoir, or *from any available pipe line* or other structure leading from said reservoir upon such terms and conditions as may be mutually agreed upon by the metropolitan district commission and the town of Clinton, but such terms shall not include any charge for water used or to be used under this act; and the town of Clinton may enter upon the lands of the commonwealth at such place or places or in such manner as may be approved by the metropolitan district commission for the purpose of constructing and maintaining thereon pipes or pipe lines or other structures for the purpose of conveying such water; provided, that for all damages caused to the commonwealth by all such work or construction the town of Clinton shall pay to the commonwealth such compensation as may be agreed upon between the said town and the said commission, . . .

To the Metro-
politan District
Commission.
1925
June 8.

By the express terms of that act the town of Clinton is authorized to take water from any available pipe line leading from the Wachusett Reservoir (and you have stated that the pipe line in question is so available), and no charge may be made for water used or to be used under the act. It is clear that no charge may be made for the use of a pipe line which would indirectly be, or result in making, a charge for water so used. The cost of water is in part determined by computing the various items of expenditure necessary to conserve and make water available, and included in such items are interest upon capital investment, depreciation and cost of operation and maintenance.

The pipe line to the Lancaster Mills is part of the capital investment, and the interest upon that investment and the cost of maintaining that pipe line are included in the cost of water and in the charge made for water. If, therefore, an annual rental should be charged for the use of the pipe line, the result would be that a charge, though small, would be made for water. In my opinion, therefore, a charge merely for the use of the pipe line in the form of an annual rental or in any other form would be in violation of the provisions of St. 1923, c. 348.

Expenses incurred by the Commission as a result of the use of the pipe line by the town of Clinton, which would not have been incurred if the town did not use the pipe line, do not enter into the cost of water taken under the act.

I am of the opinion that the Commission may lawfully insist that all such expenses be paid by the town of Clinton.

DUPLICATE LICENSES — CLERKS OF TOWNS.

Clerks of towns issuing duplicate licenses under St. 1925, c. 295, have no authority to retain any portion of the fees paid for such duplicates.

To the Com-
missioner of
Conservation.
1925
June 8.

You request my opinion whether, under St. 1925, c. 295, § 9, clerks of towns may retain twenty-five cents for each duplicate license issued by them under section 10 of that act.

Section 8 of the act provides for various forms of licenses and for the fees therefor. Section 9 provides: —

The clerk of the town where the license is issued may retain twenty-five cents from each *such* license fee.

Section 10 provides, in part: —

Whoever loses or by mistake or accident destroys his license may, . . . upon payment of a fee of fifty cents, receive a duplicate license . . .

I am of the opinion that section 9 applies exclusively to the licenses issued under section 8 and to the fees charged for such licenses, and that duplicate licenses issued under section 10 and the fees charged therefor do not come within the scope of section 9. In my opinion, therefore, clerks of towns issuing duplicate licenses have no authority to retain any portion of the fees paid for such duplicates.

EMPLOYMENT BY THE COMMONWEALTH OF A BROKER TO NEGOTIATE A SALE OF A PORTION OF THE COMMONWEALTH FLATS.

The power granted to the Division of Waterways and Public Lands by G. L., c. 91, § 2, to dispose of the lands known as the Commonwealth flats, includes by necessary implication the power to employ a real estate broker for the purpose of negotiating a sale, and to pay him compensation.

You ask me to report concerning a letter addressed to Your Excellency by the chairman of the committee on state activities, Massachusetts Real Estate Exchange. The writer of the letter asks you to ask me for a ruling as to whether the Commonwealth can pay a commission to real estate brokers for making sales of land in South Boston belonging to the Commonwealth. I interpret your communication enclosing this letter as a request for an opinion from me on that subject.

G. L., c. 91, § 2, provides, in part: —

To the
Governor.
1925
June 13.

. . . It (the Division of Waterways and Public Lands of the Department of Public Works) may make contracts for the improvement, filling, sale, use or other disposition of the lands at and near South Boston known as the Commonwealth flats, may lease any portion thereof with or without improvements thereon, may regulate the taking of material from the harbor and fix the lines thereon for filling said lands. All conveyances and contracts, and all leases for more than five years, made under this section shall be subject to the approval of the governor and council.

It was said by the court in *Cotting v. Commonwealth*, 205 Mass. 523, 526, that the authority of the Board of Harbor and Land Commissioners relative to the subject of contracts for sale of the Commonwealth flats is very broad. It is my opinion that the power granted to the Division by G. L., c. 91, § 2, includes by necessary implication the power to employ a real estate broker for the purpose of negotiating such a sale, and to pay him compensation when, in the opinion of the Division, such employment is necessary or proper for the purpose of effecting an advantageous sale. See *Armstrong v. Village of Fort Edward*, 159 N. Y. 315; *Mayor, etc., of New York v. Sands*, 105 N. Y. 210. Of course, the Division is not required in any case to employ such a broker, and may with entire propriety adopt a rule that it will not do so.

POLICE COMMISSIONER FOR THE CITY OF BOSTON — POWERS
— RULES AND REGULATIONS — HACKNEY CARRIAGE
STANDS.

The Police Commissioner for the City of Boston may grant hackney carriage stands in public streets against the protest of abutting owners or lessees, but such use of public streets must not infringe the right of abutting owners to have reasonable access to their premises.

An abutting owner or lessee cannot lawfully demand that hackney carriage stands be granted to specified persons, but he may provide cabs for the reasonable accommodation of guests or customers, subject to the right of the public to the full enjoyment of the public easement.

You ask my opinion on the following questions: —

Can the Police Commissioner grant to applicants stands in the public streets, for hackney carriage stands, in front of or adjacent to property where the owners or lessees object to the same?

Can the owner or lessee specify the particular cab owner or company which shall operate from the special hackney carriage stand granted adjacent to his premises?

G. L., c. 40, § 22, authorizes cities and towns to regulate the use of carriages and vehicles. The section is as follows: —

Except as otherwise provided in section eighteen of chapter ninety, a city or town may make ordinances or by-laws, or the board of aldermen or the selectmen may make rules and orders, for the regulation of carriages and vehicles used therein, with penalties for the violation thereof not exceeding twenty dollars for each offence; and may annually receive one dollar for each license granted to a person to use any such carriage or vehicle therein. Such rules and orders shall not take effect until they have been published at least once in a newspaper published in the city, town or county.

This provision is a reenactment of a statute first passed in 1847 (St. 1847, c. 224). Section 1 of that act was as follows: —

The mayor and aldermen of any city in this Commonwealth shall have power, from time to time, to make and adopt such rules and orders, as to them shall appear necessary and expedient, for the due regulation, in such city, of omnibuses, stages, hackney coaches, wagons, carts, drays, and all other carriages and vehicles whatsoever, used or employed wholly, or in part, in such city, whether by prescribing their routes and places of standing, or in any other manner whatsoever, and whether such carriages and other vehicles, as aforesaid, are used for burden or pleasure, or for the conveyance of passengers or freight, or otherwise, and whether with or without horse or other animal power: *provided*, that nothing contained in this act shall be construed to abridge or impair the rights of cities to make such by-laws and regulations, touching the subjects above provided for, as they now possess by virtue of their charters or the amendments thereof.

The Police Commissioner for the City of Boston has all the powers conferred upon the board of aldermen of a city by said section 22. See St. 1878, c. 244; Revised Ordinances of the City of Boston, 1882, c. 24, § 3, and 1885, c. 26, § 1; St. 1885, c. 323, § 2; St. 1906, c. 291, § 10.

Rule 58 of the rules and regulations of the Boston Police

Department, established by the Police Commissioner, relating to hackney carriages, contains the following provisions: —

3. The Police Commissioner may assign to any person or corporation licensed to set up and use a hackney carriage a place as a special stand for such licensed carriage, and the owner of more than one licensed carriage may keep any one of his licensed carriages on a stand assigned to him when it is not occupied by another licensed carriage owned by him. No such special stand shall be assigned or granted to any person who is not the owner of such licensed carriage. Permits for special stands will be issued as distinct from licenses of owners or drivers and may be revoked, suspended or transferred without affecting the validity of such licenses.

4. The Police Commissioner will designate certain places to be used as public stands by hackney carriages, not exceeding at any one time the number specified for each place. Owners or drivers of carriages shall not trespass upon special stands to which they have not been assigned, and owners or drivers of carriages who have special stands shall not trespass upon public stands; nor shall more than two carriages owned by the same person be upon a public stand at the same time to the exclusion of a hackney carriage owned by another person.

The Police Commissioner reserves to himself the right to take away, change, modify or reassign any and all privileges in and to both special and public stands at his discretion.

Under the statute set out above and its successive reenactments rules and regulations prescribing licenses, stands and routes for hackney carriages have in several cases been held to be valid. *Commonwealth v. Stodder*, 2 Cush. 562; *Commonwealth v. Gage*, 114 Mass. 328; *Commonwealth v. Matthews*, 122 Mass. 60; *Commonwealth v. Page*, 155 Mass. 227; *Commonwealth v. Morrison*, 197 Mass. 199, 204. In *Commonwealth v. Matthews*, *supra*, a regulation passed by the board of mayor and aldermen of the city of Boston providing that no person having charge of any hackney carriage shall stand with it to solicit passengers in any place other than the place assigned to it was held to be valid, and the defendant was convicted of violating the regulation.

It is a well-recognized principle in this Commonwealth, as stated in *Allen v. Boston*, 159 Mass. 324, 335, that —

The owner of the land over which a highway is laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public. This right of the owner may grow less and less as the public needs increase. But at all times he retains all that is not needed for public uses, subject, however, to municipal or police regulations.

See also *King v. Norcross*, 196 Mass. 373, 374; *Opinion of the Justices*, 208 Mass. 603, 605; *Lexington v. Suburban Land Co.*, 235 Mass. 108. It is also well settled that the owner of premises bounding on a public street has a right of access to and from the street, subject only to legitimate public regulation. *Robbins v. Borman*, 1 Pick. 122; *Tucker v. Tower*, 9 Pick. 109; *Brayton v. Fall River*, 113 Mass. 218; *French v. Connecticut River Lumber Co.*, 145 Mass. 261; *Opinion of the Justices*, 208 Mass. 603, 605; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 301–303; Dillon on Municipal Corporations, 5th ed., § 1016. “Whether carriage stands can be authorized against the protest of an abutting owner may be open to doubt.” *Commonwealth v. Morrison*, 197 Mass. 199, 204.

In other States it has been held that a license granted by public authorities will not justify a hackman in obstructing access to abutting property. *McCaffrey v. Smith*, 41 Hun. (N. Y.) 117; *Branahan v. Hotel Co.*, 39 Ohio St. 333; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 300, 304. But see *Pennsylvania Co. v. Chicago*, 181 Ill. 289.

With respect to your first question, I call your attention directly to the doubt expressed by the Supreme Judicial Court in *Commonwealth v. Morrison*, *supra*, and while there is question whether I ought to resolve the doubt, I believe that you are entitled to my judgment in the matter, which is, that you have power to grant carriage stands against the objection of abutting owners or lessees. The rights of abutting owners are not, in their nature, paramount to

the rights of the general public to use the streets in legitimate ways and for legitimate purposes, but such use of public streets by hackney stands must not be unnecessarily or unduly obstructive and must not infringe upon the right of abutting owners to have reasonable access to and from the sidewalk and the public street.

All exercise of power by public authorities and all use of rights by private individuals in the matters now under consideration must be carried on in a reasonable manner, not only in reference to the interest of the public but also in reference to the rights of landowners.

By your second question I presume you mean to ask whether the abutting owner or lessee can lawfully insist that a hackney carriage stand be granted to a certain cab owner or company. The authority to issue licenses and assign stands for licensed carriages is lodged by statute in the Police Commissioner. The right of an abutting owner or lessee to access to and from the street, subject to public regulation, does not carry with it the right to demand that hackney carriage stands be granted to specific third persons. In giving this ruling it is also necessary to point out that, in my opinion, an owner or lessee of premises abutting upon a public highway, particularly where, as under our general law, he owns the fee in the street adjoining his land, has a right to make special provision for the reasonable accommodation of his guests or customers by providing cabs for their use, whenever the public does not have occasion to exercise its easement to its full extent. *Willard Hotel Co. v. District of Columbia*, 23 App. D. C. 272; *People ex rel. Thompson v. Brookfield*, 6 App. Div. (N. Y.) 398.

The primary purpose of a highway is the passing and repassing of the public, which is entitled, so far as needed, to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose. See *Commonwealth v. Morrison*, *supra*.

INSURANCE — ADMISSION OF FOREIGN LIFE INSURANCE COMPANIES — NET VALUE OF POLICIES.

Outstanding loans to policy holders may not be deducted from the amount of the liability of a life insurance company upon its contracts, in determining the net value of all its policies, under G. L., c. 175, § 153.

You have asked my opinion upon the following questions relative to the admission of a foreign insurance company to do business in the Commonwealth under G. L., c. 175, as amended: —

To the Commissioner of Insurance.
1925
June 25.

1. May the Commissioner, in determining the net value of its policies for the purpose of section 153, deduct the amount of outstanding loans against such policies?

2. Do the words "net value of policies" mean the value calculated under section 9 without any deductions?

Section 153 of G. L., c. 175, reads as follows: —

Conditions of admission of foreign life companies. A company organized under the laws of any other of the United States for the transaction of life insurance may be admitted to do business in this commonwealth, upon complying with section one hundred and fifty-one, if it has the requisite funds of a life company and, in the opinion of the commissioner, is in sound financial condition and has policies in force upon not less than one thousand lives in the United States for an aggregate amount of not less than one million dollars. Any such company organized under the laws of a state or government other than one of the United States may be so admitted if, in addition to fulfilling the above requirements, it complies with section one hundred and fifty-five and if it shall have and keep on deposit or in the hands of trustees, as provided in said section one hundred and fifty-five and in section one hundred and fifty-six, in exclusive trust for the security of its contracts with policy holders in the United States, *funds of an amount equal to the net value of all its policies in the United States and not less than two hundred thousand dollars.*

The words "net value of policies" are declared in section 1 to have the following meaning as used in the chapter "unless the context otherwise requires or a different meaning is specifically prescribed": —

The liability of a company upon its insurance contracts, other than accrued claims, computed by rules of valuation established by sections nine to twelve, inclusive.

Sections 9 to 12 establish a mode of computation which the Commissioner is bound to follow in determining the net value of policies. 1 Op. Atty. Gen. 269. He is required to use the methods of computation therein set forth, and cannot modify the results of such computations by making any deductions therefrom not authorized by the terms of the statute. No provision is made by these sections for the deduction from the figures arrived at by the prescribed computations of the amount of outstanding loans to policy holders, nor are such loans mentioned in these sections or elsewhere in the chapter as a credit to be allowed to the insurance company in the establishment of its financial condition.

There is nothing in the context of section 153 nor in its prescribed terms to indicate that the words "net value of all its policies" do not have the same meaning as is given to "net value of policies" by the definition in section 1.

I accordingly answer your first question in the negative, and your second question to the effect that the words "net value of policies" mean, as stated in section 1, "the liability of a company upon its insurance contracts, other than accrued claims, computed by rules of valuation established by sections nine to twelve, inclusive," without any deductions from the figures so reached other than those which are specifically provided for by sections 9 to 12.

HOURS OF LABOR — "OVERTIME EMPLOYMENT" — LEGAL HOLIDAY.

The words "overtime employment," as used in G. L., c. 149, § 56, as amended by St. 1921, c. 280, limiting the hours of labor of women and children in factories, requiring the posting of a printed notice giving a schedule of the hours for each week and regulating overtime employment, mean employment at any time not included in the notice.

The hours of labor may include a part of Saturday afternoon, if so designated.

You request my opinion as to the interpretation of the words "overtime employment," as used in G. L., c. 149, § 56. You state that the question has arisen on account of the practice in certain textile mills, when a legal holiday occurs in the course of a week on a day other than Saturday, of including in the printed notice stating the hours of employment, required by section 56, a part of Saturday afternoon, although it is customary with them to close at noon on Saturdays, the hours of employment so stated, however, not exceeding the nine hours a day and forty-eight hours a week limit for the employment of women provided by section 56.

The pertinent provisions of G. L., c. 149, § 56, as amended by St. 1921, c. 280, are as follows: —

No child and no woman shall be employed in laboring in any factory or workshop, or in any manufacturing, mercantile, mechanical establishment, . . . more than nine hours in any one day . . . ; and in no case shall the hours of labor exceed forty-eight in a week, . . . Every employer, except those hereinafter designated, shall post in a conspicuous place in every room where such persons are employed a printed notice stating the number of hours' work required of them on each day of the week, the hours of beginning and stopping work, and the hours when the time allowed for meals begins and ends, or, in case of mercantile establishments and of establishments exempted from sections ninety-nine and one hundred, the time, if any, allowed for meals. The employment of any such person at any time other than as stated in said printed notice shall be deemed a violation of this section unless it appears that such employment was to make up time lost on a previous day of the same week in consequence of the stopping of machinery upon which such person was employed or dependent for employment; but no stopping of machinery for less than thirty consecutive minutes shall justify such

To the Commissioner of
Labor and
Industries.
1925
June 29.

overtime employment, nor shall such overtime employment be authorized until a written report of the day and hour of its occurrence and its duration is sent to the department, nor shall such overtime employment be authorized because of the stopping of machinery for the celebration of any holiday. . . .

In my opinion, the words "overtime employment," as used in said section, mean employment at any time not included in the printed notice. No such overtime employment is permitted because of the stopping of machinery for the celebration of any holiday. But there is nothing in section 56 to prevent the inclusion in the printed notice of a part of Saturday afternoon if the total number of hours in any one day does not exceed nine and the hours of labor for the week do not exceed forty-eight. So long as the hours of employment specified are not prohibited by other statutory provisions I see nothing in section 56 making it unlawful to include them in the printed notice, whatever the reason for such inclusion may be. *Cf. Commonwealth v. Riley*, 210 Mass. 387, 391-393.

LICENSE TO OPERATE A MOTOR VEHICLE — "FINAL CONVICTION."

The term "final conviction" does not apply to the judgment and sentence of a district court when the defendant has filed an appeal therefrom.

You state that on June 10, 1924, a person pleaded guilty to a charge of operating a motor vehicle while under the influence of intoxicating liquor; that he was sentenced to imprisonment for a term of one month, from which sentence he appealed; and that on February 16, 1925, he was fined \$100 in the Superior Court. You inquire whether the period within which no new license may be issued runs from June 10, 1924, or from February 16, 1925.

G. L., c. 90, § 24, as amended, provides, in part: —

The registrar . . . after an investigation or upon hearing may issue a new license to a person convicted in any court; provided, that no new

license shall be issued by the registrar to any person convicted of operating a motor vehicle while under the influence of intoxicating liquor until one year after the date of final conviction, if for a first offence.

It is clear that the term "final conviction" does not apply to the judgment and sentence of the district court when the defendant has filed an appeal therefrom and has had his case disposed of in the Superior Court. In my opinion, therefore, the period within which a new license may not be issued under the facts stated begins to run on February 16, 1925.

TOWNS — UNION SUPERINTENDENT — SALARY — STATE REIMBURSEMENT.

The "valuation" of the several towns was last determined on or before April 1, 1925, under G. L., c. 4, § 7, cl. 35, and G. L., c. 58, §§ 9 and 10, as amended by St. 1921, c. 379, §§ 1 and 2. Accordingly, at the end of the school year on June 30, 1925, the valuation fixed on April 1, 1925, should be used as the basis for distribution of reimbursement authorized by G. L., c. 71, § 65.

You request my opinion on the following question with respect to reimbursement to towns that have unitedly employed a superintendent of schools: —

To the Commissioner of
Education.
1925
June 30.

Will those towns whose valuation was established by the General Court in 1925 receive aid under the distribution for the school year ending June 30, 1925, or should the valuation for the previous three years be used as a basis for such distribution?

G. L., c. 71, § 61, authorizes the union of towns for employment of a superintendent. Section 63 outlines the organization and duties of joint school committees of such unions. The salary of union superintendents is fixed by section 64. The Commonwealth grants reimbursement for a part of the salary and expenses of such superintendent, as provided by section 65, which is as follows: —

When the chairman and secretary of the joint committee certify to the state auditor, on oath, that the towns unitedly have employed a

superintendent of schools for the year ending on June thirtieth, and have complied with section sixty-three, a warrant shall, upon the approval of the department, be drawn upon the state treasurer for the payment of two thirds of the sum of the following amounts: (1) the amount paid to the superintendent as salary not including any such amount in excess of twenty-five hundred dollars, and (2) the amount reimbursed to the superintendent for traveling expenses not including any such amount in excess of four hundred dollars. The amount stated in the warrant shall be apportioned and distributed among the towns forming the union in proportion to the amounts expended by them for the salary and traveling expenses of the superintendent; provided, that the amount apportioned to any town whose valuation then exceeds three million five hundred thousand or to any town whose valuation exceeded two million five hundred thousand at the time of its entry into a union, shall be retained by the commonwealth.

G. L., c. 4, § 7, cl. 35th, defines "valuation" as follows: —

In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears:

Thirtieth, "Valuation," as applied to a town, shall mean the valuation of such town as determined by the last preceding apportionment made for the purposes of the state tax.

The equalization and apportionment upon the several towns of the state tax is provided for by G. L., c. 58, §§ 9 and 10, as amended by St. 1921, c. 379, §§ 1 and 2. Section 9, as amended, reads as follows: —

In nineteen hundred and twenty-two and in every third year thereafter, the commissioner shall, on or before April first report to the general court an equalization and apportionment upon the several towns, of the number of polls, the amount of property, and the proportion of every one thousand dollars of state or county tax, including polls at one tenth of a mill each, which should be assessed upon each town.

Accordingly, the "valuation" of the several towns was last determined on or before April 1, 1925. It follows that at the ending of the school year on June 30, 1925, the valuation of the various towns was already fixed. I am

therefore of the opinion that such valuation should be used as the basis for distribution of reimbursement authorized by G. L., c. 71, § 65.

SAVINGS BANKS — INVESTMENTS IN MUNICIPAL BONDS.

Bonds for municipal purposes, which are not direct obligations of the municipalities which purport to issue them, are not lawful investments for savings banks.

You have requested my opinion as to whether a certain issue of bonds, called "water works bonds," of the city of San Antonio, Texas, are a legal investment for the savings banks of this Commonwealth. I assume from your letter and accompanying documents that the bonds in question are legal, duly authorized and properly issued, and that they are for the purpose of enabling the city of San Antonio to acquire a water works and to supply water to its citizens.

To the Com-
missioner of
Banks.
1925
July 1.

G. L., c. 168, § 54, as amended by St. 1925, c. 209, § 3, provides "that deposits and the income derived therefrom held by savings banks shall be invested only as follows":—

(f) In the legally authorized bonds for municipal purposes or in refunding bonds issued to take up at maturity bonds which have been issued for other than municipal purposes, but on which the interest has been fully paid, of any city of any state of the United States, other than a territory or dependency thereof, which was incorporated as such at least twenty-five years prior to the date of such investment, which has at such date more than one hundred thousand inhabitants, established in the same manner as is provided in subdivision (e) of this clause, and whose net indebtedness does not exceed seven per cent of the valuation of the taxable property therein, to be ascertained as provided in said subdivision (e).

Subdivision (e) reads:—

. . . as established by the last national or state census, or city census certified to by the city clerk or treasurer of said city and taken in the same manner as a national or state census, preceding such date, and whose net indebtedness does not exceed five per cent of the valuation of the

taxable property therein, to be ascertained by the last preceding valuation of property therein for the assessment of taxes.

Each of the bonds in question purports, in the wording of its first paragraph, to be a contract on the part of the city of San Antonio to pay to the holder the face value of the bond, and interest, but further provisions of the instrument provide:—

This bond shall never be a debt of said city but solely a charge upon said water plant and system . . . The holder hereof shall never have the right to demand payment of this obligation out of any funds raised or to be raised by taxation.

The only obligation resting upon the city by the terms of these bonds is to pay money due on the bond to the holder from a fund to be set aside from the revenues to be derived from the operation of the water works for the purposes of such payment. The terms of the trust deed given by the city to the St. Louis Union Trust Company for the benefit of the bondholders also disclose the fact that no direct obligation for the payment of principal or interest of these bonds rests upon the city, and that the holder's security is limited to a mortgage upon the physical property of the water works, the management of the water works by a board of trustees, and certain agreements by the city as to the levy, collection and application of the revenues of the water works to the payment of the principal and interest of the bonds.

While these bonds may be correctly described, in a sense, as legally authorized for municipal purposes, I am of the opinion that they do not come within the meaning of those words as used by the Legislature in this section of the statute in designating bonds for investment. The reference in subdivision (e) above noted, relative to the mode of ascertaining the net indebtedness of municipalities making bond issues, plainly indicates an intent on the part of the Legislature that the securities referred to should be the

direct obligations of the municipalities issuing them, so that the investor might have the right of recourse to the municipalities themselves and be secured therein by the taxable value of their property. Section 54, read as a whole, emphasizes the intent of the Legislature in this regard.

I am of the opinion that the bonds referred to in your letter are not legal for investment by savings banks in this Commonwealth.

PRINTING FOR MILITARY PURPOSES.

Printing for military purposes must be done under the supervision of the Division of Personnel and Standardization.

You request my opinion as to whether printing ordered by the Adjutant-General is subject to the supervision of the Division of Personnel and Standardization.

To the Commission on Administration and Finance.
1925
July 7.

G. L., c. 7, as amended by St. 1923, c. 362, § 1, provides that your board shall, subject to the approval of the Governor and Council, make rules, regulations and orders which shall regulate and govern the purchasing, delivering, handling of and contracting for supplies, equipment and other property "except when they are for legislative or military purposes."

G. L., c. 5, § 1, as amended by St. 1923, c. 362, § 5, and by St. 1923, c. 493, provides that the Division of Personnel and Standardization shall supervise the State printing and that the Commission on Administration and Finance shall, subject to the approval of the Governor and Council, make such contract or contracts for the printing and binding for the several departments as it deems advisable, but that these provisions shall not apply to legislative printing or to certain publications required to be issued by the Secretary of the Commonwealth. Military printing or printing for military purposes is not specifically exempted, nor, in view of the fact that this section specifically provides for printing, can printing be regarded as included in the items described

in G. L., c. 7, as amended by St. 1923, c. 362, § 1. The provisions of G. L., c. 5, § 1, as amended, embrace all State printing which is not specifically excluded.

I am accordingly of the opinion that the printing for military purposes must be done under the Supervision of the Division of Personnel and Standardization.

The opinion of the Attorney-General given you under date of January 25, 1923 (VII Op. Atty. Gen. 5), was rendered under St. 1922, c. 545, §§ 10 and 11, some months prior to the enactment of St. 1923, c. 362. In so far as printing is concerned the former opinion is no longer applicable. The view therein expressed relative to the authority of the Adjutant-General to furnish paper for printing applies also to the present provisions of law.

INSURANCE — FORM OF POLICY — INCONTESTABILITY.

The form of an intermediate policy which is to supersede an industrial policy upon conversion by the insured does not conform to the requirements of the statutes if it contains terms relative to incontestability which do not conform to the provisions of G. L., c. 175, § 132, as amended.

To the Com-
missioner of
Insurance.
1925
July 8.

You have requested my opinion relative to the authority of the Commissioner of Insurance as regards his approval of a certain form of endowment life insurance policy, called an intermediate policy, which you have submitted for my inspection.

Your letter reads as follows: —

An insurance company has submitted to this department for approval a policy form which provides that "This Policy shall be incontestable from its date." The policy is an intermediate policy for \$500, the premiums upon which are payable annually, semi-annually or quarterly and is issued to a person insured under an industrial policy containing a provision for its conversion into an intermediate policy at the attained age of the insured. The new or intermediate policy is to be issued on a new application.

Your opinion is respectfully requested as to whether the Commissioner may lawfully approve this form of intermediate policy, so called, to be issued under the circumstances above set forth.

You state in your letter that the intermediate policy is issued by the insurance company writing it to "a person insured under an industrial policy containing a provision for its conversion into an intermediate policy," and you have submitted to me for examination the form of the industrial policy which you refer to.

The industrial policy, which is for the same principal sum as the intermediate policy, five hundred dollars, provides for the payment of a weekly premium, and contains this clause:—

CONVERSION INTO AN INTERMEDIATE ENDOWMENT POLICY AT
AGE EIGHTEEN.

At any time within six months after the anniversary of this Policy next preceding the eighteenth birthday of the insured, provided the Policy be then in full force and effect, and there has been no default in the payment of premiums and no payment has been made on account of disability as herein provided, the Policy upon its surrender may be converted into an Intermediate Thirty-three-Year Endowment Policy for the amount of Five Hundred Dollars, payable on the anniversary of this Policy next preceding the fifty-first birthday of the Insured, if the Insured be then living, or at the prior death of the Insured; such Intermediate Endowment Policy to be non-forfeitable from its date and to be subject to the payment of an annual premium of \$12.00, which may be paid in semi-annual instalments of \$6.24 each or quarter-annual instalments of \$3.18 each, at the election of the Insured.

It also contains this provision:—

Incontestability.—After this Policy shall have been in force, during the lifetime of the Insured, for one full year from its date, it shall be incontestable, except for non-payment of premium, but if the age of the Insured be misstated, the amount payable under this Policy shall be such as the premium would have purchased at the correct age.

The intermediate policy recites in its first clause:—

In Settlement Under Industrial Policy No., heretofore issued on the life of the person hereinafter designated as the Insured, and pursuant to an agreement therein contained, and in consideration of the Application for this Policy, which is hereby made part of this contract, a copy

of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby endows and insures the person herein designated as the Insured, for the amount named herein, payable as specified, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract.

It contains the following provision: —

Incontestability. — This Policy shall be incontestable from its date, except for non-payment of premium, but if the age of the Insured be misstated the amount or amounts payable under this Policy shall be such as the premium would have purchased at the correct age.

The policy and application indicate that the premiums are to be paid annually, semi-annually or quarterly.

The provisions of the statutes applicable to the approval of the form of the intermediate policy are as follows: —

G. L., c. 175, § 132, as amended:

No policy of life or endowment insurance and no annuity or pure endowment policy shall be issued or delivered in the commonwealth until a copy of the form thereof has been on file for thirty days with the commissioner, unless before the expiration of said thirty days he shall have approved the form of the policy in writing; nor if the commissioner notifies the company in writing, within said thirty days, that in his opinion the form of the policy does not comply with the laws of the commonwealth, specifying his reasons therefor, provided that such action of the commissioner shall be subject to review by the supreme judicial court; nor shall such policy, except policies of industrial insurance, on which the premiums are payable monthly or oftener, and except annuity or pure endowment policies, whether or not they embody an agreement to refund to the estate of the holder upon his death or to a specified payee any sum not exceeding the premiums paid thereon with interest, be so issued or delivered unless it contains in substance the following:

2. A provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue except for non-payment of premiums or violation of the conditions of the policy relating to military or naval service in time of war and except, if the company so elects, for the purpose of contesting

claims for total and permanent disability benefits or additional benefits specifically granted in case of death by accident.

.

The form of the intermediate policy submitted to me does not contain the substance of section 132 relative to incontestability, but instead sets forth that it is incontestable from its date.

The intermediate policy is not a policy of industrial insurance on which the premiums are payable monthly or oftener, and therefore does not fall within the exception to the application of section 132 contained therein, given to such an industrial policy.

The fact that the first policy of insurance, which provides for conversion into the intermediate policy at the election of the insured, is itself an industrial policy on which the premiums are payable weekly, does not operate to change the character of the intermediate policy so as to bring it within the statutory exception. The intermediate policy is a new policy, not a continuation of the one first issued to the insured. It is issued upon a new application and upon the surrender of the one first issued. Moreover, its premiums are to be paid not less often than quarterly.

In my judgment, the provision in question is not a compliance with the requirements of the statute. It may be argued that the requirements are contained in substance, and are stated in terms more favorable to the insured or his beneficiary than are set forth in the statute. By an amendment passed in 1921 the Commissioner was authorized to pass upon the question whether or not terms are more favorable. You will note, however, that while our Supreme Court, in 1908, in the case of *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, ruled that no departure from the exact requirements of the statute should be permitted in any policy unless it was too plain for doubt that the substitution was in every way as advantageous and as desirable to the insured as the prescribed provision, nevertheless it found against a provision in a certain policy that it

"shall be incontestable, except for non-payment of premiums, from its date." It was held that such a provision was not a compliance with the requirements of the statute, and in addition that it was not in accordance with public policy. For this latter proposition they referred to the case of *Reagan v. Union Mutual Life Ins. Co.*, 189 Mass. 555. These cases, in my opinion, preclude you from approving the instant policy.

NOTARY PUBLIC — CITIZENSHIP BY MARRIAGE.

An applicant for appointment to the office of notary public, born in Ireland, is an American citizen if his father was dead when his mother married a citizen of the United States during his minority and he became a permanent resident of the United States, provided his mother did not again change her citizenship during his minority.

Prior to 1922, an alien woman who married an American citizen became an American citizen herself, and the naturalization of the parent carried with it the naturalization of minor children dwelling in the United States.

To the
Governor.
1925
July 15.

You have referred to me an application for appointment to the office of notary public, and request my opinion as to whether the claim to citizenship set forth by the applicant is valid. In his application the applicant gives his date of birth as August 12, 1899, and his place of birth as Cork, Ireland. He bases his claim to United States citizenship on the ground that his mother married his stepfather, who was and is a citizen of the United States, the marriage taking place in 1905 when the applicant was a minor.

Prior to 1922, an alien woman who married an American citizen and who might lawfully become naturalized thereby became an American citizen herself, and the naturalization of the parent carried with it the naturalization of minor children dwelling in the United States. It does not appear, first, whether or not the father of the applicant was living at the time of the marriage of his mother to the stepfather, or, second, whether the applicant came to the United States and became a permanent resident here during his minority. If the applicant's father was living at the time of the mother's

second marriage, the citizenship of the applicant would follow that of his own father; but if the father was deceased at the time of said marriage and the applicant became a permanent resident of the United States during his minority, he undoubtedly became an American citizen by virtue of the marriage of his mother to an American citizen, provided she did not again change her citizenship during the remaining period of the applicant's minority.

STATE RETIREMENT ASSOCIATION — INTEREST.

Interest may not be allowed on money paid in by a member of the State Retirement Association for any period after the date of cessation of employment.

You request my opinion as to whether, if a member of the State Retirement Association resigns from his employment between interest dates, as fixed by G. L., c. 32, § 1, before becoming entitled to a pension, but does not withdraw his payments until a subsequent interest date, there is authority for paying interest figured under the statute up to such subsequent interest date.

To the
Board of
Retirement.
1925
July 27.

The provision in regard to refunding payments in case of resignation is contained in G. L., c. 32, § 5 (2) A (a), and reads as follows: —

Should a member of the association enter a position in the service of the commonwealth not covered by sections one to five, inclusive, or cease to be an employee of the commonwealth for any cause other than death, or for the purpose of entering the service of the public schools as defined in section six, before becoming entitled to a pension, there shall be refunded to him all the money paid in by him under section four (2) A, with such interest as shall have been earned thereon.

In view of the provision that the interest to be paid shall be "such interest as shall have been earned thereon," there is, in my opinion, no authority for paying interest covering any period subsequent to the date of cessation of employment. Accordingly, I answer your question in the negative.

NOTARIES PUBLIC — WOMEN — RE-REGISTRATION — MASS.
CONST. AMEND. LXIX.

Women notaries public are required to re-register when their names are changed. Until the Legislature has established a fee for such re-registration none can be required.

To the
Governor
and Council.
1925
July 30.

Your letter of July 24th reads as follows: —

On April 13, 1925, your department advised me informally that Mass. Const. Amend. LXIX, § 2, which relates to the change of name by a woman holding certain commissions, is now in effect, and that, pending action by the Legislature, such a woman may re-register as therein provided, without payment of a fee.

Acting under authority of His Excellency the Governor and the Council, I respectfully request your opinion thereon, with special regard to the limitations of the amendment as applying to various commissions which may be held by women.

Mass. Const. Amend. LXIX, which is now in force, reads as follows: —

SECTION 1. No person shall be deemed to be ineligible to hold state, county or municipal office by reason of sex.

SECTION 2. Article IV of the articles of amendment of the constitution of the commonwealth, as amended by article LVII of said amendments, is hereby further amended by striking out the words "Change of name shall render the commission void, but shall not prevent reappointment under the new name," and inserting in place thereof the following words: — Upon the change of name of any woman, she shall re-register under her new name and shall pay such fee therefor as shall be established by the general court.

The only office to which section 2 of the amendment relates is that of a notary public. Its provisions are not applicable to women holding other offices or commissions.

Since the adoption of the amendment by the voters at the election in November, 1924, the Legislature has not voted with relation to the establishment of a fee for re-registration. I am of the opinion that the failure of the Legislature to establish the fee does not prevent the amendment from

taking effect as to its main purpose. In view of the mandatory language of the amendment, I am of the opinion that it is self-executing so far as to require the re-registration of a woman notary public upon a change being made in her name, and that in the absence of legislative action establishing a fee for such re-registration under her new name, she cannot be required to pay one.

POLICE COMMISSIONER FOR THE CITY OF BOSTON —
POWERS — REMOVAL OF POLICE OFFICER.

The removal of a police officer in the city of Boston is subject to the requirements of G. L., c. 31, § 44, whereby he is entitled to a public hearing.

The trial board established by St. 1906, c. 291, § 10, is a merely advisory board whose function is to report its findings to the Commissioner for final disposition.

You ask my opinion on the following questions: —

To the Police
Commissioner
of Boston.
1925
August 4.

1st. Is it within my power to dismiss a police officer under G. L., c. 31, without a hearing, thereby imposing the duty upon him of requesting a *public* hearing within the period specified under the statute?

2d. Am I obliged to grant a *public* hearing to one whom I have dismissed after a hearing and finding of "guilty" before a trial board, and with which finding I am in accord?

These questions involve the construction of St. 1906, c. 291, § 10, and of G. L., c. 31, § 44, which are respectively as follows: —

St. 1906, c. 291, § 10: —

The police commissioner shall have authority to appoint, establish and organize the police of said city and to make all needful rules and regulations for its efficiency. He shall from time to time appoint a trial board, to be composed of three captains of police, to hear the evidence in such complaints against members of the force as the commissioner may deem advisable to refer to said board. Said trial board shall report its findings to said commissioner who may review the same and take such action thereon as he may deem advisable. Except as otherwise provided herein all the powers and duties now conferred or imposed by law upon the board of police of the city of Boston, are hereby conferred and im-

posed upon said police commissioner. All licenses issued by said police commissioner shall be signed by him and recorded in his office.

G. L., c. 31, § 44: —

Except as provided in section twenty-six, every police officer holding an office classified under the civil service rules, in any city, whether for a definite or stated term, or otherwise, shall hold such office continuously during good behavior, and shall not be removed therefrom, lowered in rank or compensation, or suspended, or without his consent transferred from such office or employment to any other, except for just cause and for reasons specifically given in writing by the removing officer or board within twenty-four hours after such removal, suspension, transfer or lowering in rank or compensation; and every police officer sought to be so removed, lowered in rank or compensation, suspended or transferred shall be entitled to a public hearing, the same in all respects as provided in the preceding section, including notice of decision, reinstatement and record of proceedings.

By said section 10 all the powers and duties then conferred or imposed by law upon the board of police of the city of Boston, except as therein otherwise provided, were thereby conferred and imposed upon the police commissioner.

St. 1885, c. 323, § 2, conferred upon and vested in the board of police all the powers then vested in the board of police commissioners in the city of Boston, except as otherwise thereby provided.

St. 1878, c. 244, § 3, authorized the board of police commissioners to remove police officers for cause. Said section is as follows: —

The said board of police commissioners shall appoint a superintendent of police, a deputy superintendent of police, and such number of captains, inspectors, sergeants, patrolmen, clerks and other officers as the city council may from time to time by ordinance prescribe: *provided, however*, that the appointment of the superintendent of police, the deputy superintendent of police and the captains of police shall be subject to approval by the mayor of the city. Any of said officers or members of the department may be removed by the board for cause. The compensation of the commissioners and the officers of each grade shall be fixed from time to time by ordinances of the city council.

Prior to the enactment of St. 1906, c. 291, St. 1906, c. 210, entitled "An Act relative to removals and suspensions from office and employment of police officers in the classified civil service," had been enacted, providing as follows: —

SECTION 1. Every police officer now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth, in any city, and whether appointed for a definite or stated term, or otherwise, shall hold such office continuously during good behavior, and shall not be removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other, except for just cause and for reasons specifically given in writing by the removing officer or board.

SECTION 2. The provisions of section two of chapter three hundred and fourteen of the acts of the year nineteen hundred and four, and of acts in amendment thereof, shall apply to the police officers designated in section one hereof.

SECTION 3. This act shall take effect upon its passage.

St. 1904, c. 314, § 2, referred to in section 2 above, is as follows: —

The person sought to be removed, suspended, lowered or transferred shall be notified of the proposed action and shall be furnished with a copy of the reasons required to be given by section one, and shall, if he so requests in writing, be given a public hearing, and be allowed to answer the charges preferred against him either personally or by counsel. A copy of such reasons, notice and answer and of the order of removal, suspension or transfer shall be made a matter of public record.

It was held in *Logan v. Mayor and Aldermen of Lawrence*, 201 Mass. 506, 511, that St. 1906, c. 210, must be deemed to be in amendment of all city charters whose provisions it modifies. Regarding the statute the court says, in part: —

This was enacted as a part of the broad scheme designed to bring about a reform in the civil service not only of the Commonwealth itself but quite as much of its cities and towns. See R. L., c. 19, and the many acts passed in amendment and extension thereof. This body of laws was intended to be of general application, except as restricted by R. L., c. 19, § 36, and St. 1902, c. 544, § 3. To say that any city was to be exempted from the provisions of either the whole or any particular part of this legislation would be to frustrate the manifest intent of the Legislature. Almost all of the cities of the Commonwealth have in their

charters provisions similar in kind to those which appear in the charter of the city of Lawrence, with reference both to the police department and to other branches of the civil service. General legislation like that which we are now considering must be deemed to be in amendment of all those charters, so far as it modifies their provisions, . . .

The office of Boston police was one then classified under the civil service rules. It is my opinion, therefore, that, at the time of the enactment of St. 1906, c. 291, St. 1906, c. 210, was applicable to the removal of police officers in the city of Boston, and that the power of the board of police of the city of Boston had been accordingly restricted.

The trial board established by St. 1906, c. 291, § 10, is a merely advisory board whose function is to report its findings to the Commissioner for final disposition. Concerning this trial board the court said in *Welch v. O'Meara*, 195 Mass. 541, 542, as follows:—

This trial board is to act only upon such complaints as the commissioner deems it advisable to refer to it. This provision shows that the commissioner may hear complaints and act upon them without such a reference. This board cannot finally dispose of a case, but it can only report its findings to the commissioner. The right of the commissioner to "review the same and take such action thereon as he may deem advisable" includes the right to set them aside for good cause, and to make others upon a proper hearing, and then to take further action. The power to hear and determine everything under such complaints was given to the board of police by the former statute, and by this section it is given to the police commissioner. The trial board is a tribunal appointed to relieve the police commissioner by hearing the evidence and finding the facts in such cases as he thinks it best to refer to it.

There is, in my judgment, nothing inconsistent between the provision in chapter 291, section 10, authorizing the Police Commissioner to appoint a trial board and to review its findings and take such action thereon as he may deem advisable, and the provisions in chapter 210 imposing conditions upon the removal and suspension of police officers.

Gen. St. 1918, c. 247, combined and revised the provisions of St. 1904, c. 314, and St. 1906, c. 210. This act is codified in G. L., c. 31, §§ 43, 44, 45.

It is my opinion, therefore, that the removal of police officers in the city of Boston is subject to the requirements of G. L., c. 31, § 44. See *Gordon v. Chief of Police of Cambridge*, 244 Mass. 491; *Mayor of Medford v. Judge of District Court*, 249 Mass. 465.

Accordingly, I reply specifically to your questions as follows:—

1. It is within your power to remove a police officer under G. L., c. 31, § 44, without a hearing other than the hearing provided for by section 44, provided that the requirements of said section are complied with.

2. In accordance with the requirements of section 44 you are obliged to give a public hearing to a police officer whom you have sought to remove, the method of such hearing being as provided in G. L., c. 31, § 43.

There may be some question as to the manner and form of the action necessary to accomplish a removal under section 44. Prior to the act of 1918 the first step was the giving of notice of the proposed action and the furnishing of a copy of the reasons therefor. Under this law a notice of discharge has been held to be in violation of the civil service laws. *Tucker v. Boston*, 223 Mass. 478; *Thomas v. Municipal Council of Lowell*, 227 Mass. 116. The requirement of notice, however, does not appear in the 1918 statute, and in *Gordon v. Chief of Police of Cambridge*, *supra*, under the new law, the action of the respondent in removing the petitioner from the police department and causing to be delivered to him within twenty-four hours a written notice to that effect, with certain specific reasons for his action, was held to be in compliance with the statute. Clearly, however, such removal cannot be effective until the time has elapsed within which the officer may request a public hearing, or if such hearing is requested, until the hearing is held and a decision made. It seems to me that it would be safe to follow the procedure in the *Gordon* case, which was approved by the full court.

EDUCATION — STATE REIMBURSEMENT — TEACHERS' SALARIES.

Towns are not entitled, under G. L., c. 70, § 1, to State reimbursement for salaries paid teachers on sabbatical leave.

To the Com-
missioner of
Education.
1925
August 7.

You request my opinion whether certain towns which grant sabbatical leave on half pay to teachers who have served six years, such leave of absence being for the purpose of study under the direction of the superintendents of schools, are entitled to part reimbursement by the State, under G. L., c. 70, for the salary so paid.

I assume that the salaries are paid for services rendered, and that the towns in question are authorized to pay them. See *Averell v. Newburyport*, 241 Mass. 333; *Whittaker v. Salem*, 216 Mass. 483.

G. L., c. 70, § 1 (St. 1923, c. 145), provides for part reimbursement "for salaries paid to teachers . . . for services in the public day schools rendered during the year ending the preceding June thirtieth."

In my opinion, the words "salaries paid to teachers . . . for services in the public day schools" mean salaries for services as teachers in the schools, and not for services which consist not in teaching but in preparation for teaching in the future.

Accordingly, I answer your question in the negative.

GOVERNOR AND COUNCIL — COMPENSATION FOR TRAVEL — "ABODE."

The word "abode," as used in G. L., c. 6, § 4, providing that the Lieutenant Governor and each member of the Council shall be paid for travel from his abode and return his actual expenses as certified by him, means home or domicile and not place of temporary sojourn.

The amount to be paid is the amount actually expended for travel and not an arbitrary mileage.

To the
Governor
and Council.
1925
August 10.

You have asked my opinion as to the construction of G. L., c. 6, § 4, providing for the compensation of the Lieutenant Governor and each member of the Council

for travel "from his abode to the place of sitting of the governor and council, and return." You ask particularly whether the "abode" of a member of the Council under this provision means his home or includes a place of sojourn or temporary residence, and what is the basis for determining the amount which he is to receive for travel.

G. L., c. 6, § 4, is as follows: —

The lieutenant governor and each member of the council shall be paid for his travel from his abode to the place of sitting of the governor and council, and return, such amounts as he certifies in writing that he has actually expended therefor in the performance of his official duties.

The word "abode" is well defined as "the place where a person dwells." *Dorsey v. Brigham*, 177 Ill. 250; Bouvier's Law Dictionary. It is the place of a person's residence, according to the ordinary meaning of that word. "Abode" and "residence" have been used as synonymous in several of the opinions of our court. *Viles v. Waltham*, 157 Mass. 542; *Barron v. Boston*, 187 Mass. 168; *Emery*, 218 Mass. 227.

"Domicil" or "home," on the one hand, and "residence," on the other hand, have frequently a different meaning. *Harvard College v. Gore*, 5 Pick. 370; *Briggs v. Rochester*, 16 Gray, 337, 340; *Thayer v. Boston*, 124 Mass. 132. But in our Constitution and statutes the word "residence" is often used as meaning "home" or "domicil." *Lee v. Boston*, 2 Gray, 484; *Briggs v. Rochester*, *supra*.

In Mass. Const., pt 2nd, c. I, § II, art. II, it is provided: —

. . . And to remove all doubts concerning the meaning of the word "inhabitant" in this constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this state, in that town, district, or plantation where he dwelleth, or hath his home. . . .

Thus, in the Constitution the place where a man dwells or has his abode is referred to as synonymous with his home. See *Putnam v. Johnson*, 10 Mass. 488, 499, 500.

So in the statutes the word "abode" is used with the apparent meaning of "home." The word "abode" is used in providing for payment for travel to Councillors, to members of the General Court (G. L., c. 3, § 9), and to certain legislative officials (G. L., c. 3, § 20), while the word "home" is used in precisely the same manner in providing for payment for travel to jurors (G. L., c. 262, § 25) and to witnesses (G. L., c. 262, § 29). In an opinion of a former Attorney-General on certain questions as to payment for travel to members of the General Court the words "place of abode" and "home" were treated, without discussion, as synonymous. I Op. Atty. Gen. 42.

Accordingly, I am of the opinion that the word "abode" as used in G. L., c. 6, § 4, means "home" or "domicil" and not a place of temporary sojourn different from the home.

The amount which the statute provides shall be paid for a member's travel is the amount actually expended, as certified by the member in writing. He is not entitled to an arbitrary sum fixed as mileage nor to an amount which he might theoretically have expended by some particular mode of travel, but only to the amount which he has in fact expended upon travel between his home and the place of sitting of the Governor and Council.

INSPECTION OF FOOD — LABEL — WEIGHT OF LOAVES OF BREAD.

Under G. L., c. 94, § 8, and the rules and regulations of the Director of Standards, requiring the weight of loaves of bread and the name of the manufacturer to be plainly stated on a wrapper or label, the wrapper or label may also contain any legend or design which does not obscure the required information and is actually separate and distinct.

You have asked me to advise you as to the construction of the law relative to printed matter on labels indicating the weight of loaves of bread.

G. L., c. 94, § 8, as amended, provides: —

Unit weights, as defined in the preceding section, shall not apply to rolls or to fancy bread weighing less than four ounces, nor to loaves bearing in plain position a plain statement of the weight of the loaf and the name of the manufacturer thereof. Such information shall be stated in case of wrapped bread, upon the wrapper of each loaf, and in the case of unwrapped bread by means of a pan impression or other mechanical means or upon a label not larger than one by one and three quarters inches nor smaller than one by one and one half inches. No label, attached to an unwrapped loaf, shall be larger than provided herein, nor shall any such label be affixed in any manner or with any gum or paste which is unsanitary or unwholesome. . . .

Section 9 provides that the Director of Standards shall prescribe such rules and regulations as are necessary to enforce section 8.

The Director of Standards has prescribed rules and regulations under authority of section 9. The fourth of these reads:—

The phrase “plain statement in plain position” shall be construed as requiring that the statement of weight and the name of the manufacturer shall be plain and conspicuous, and shall not be a part of or obscured by any legend or design. The statement shall be printed upon the wrapper or label in plain, heavy gothic capital letters and figures not less than $\frac{5}{32}$ inch in height, and shall be so placed as to appear upon the top or side and not upon the end or bottom of the loaf. Unless otherwise specifically approved by the Director of Standards, red, blue or black ink shall be employed in printing the required statement.

There is nothing in the statute or in the rules and regulations which prohibits the use upon the wrapper or label used in connection with a loaf of bread of any words or design so placed that the required statement of the weight of the loaf and the name of the manufacturer is not obscured by such words or design and is not included as a part of such words or design. The use of printed words or a design, such as a trade mark or a union label, placed upon a separate line from the words giving the weight and the name of the manufacturer, is not prohibited by the statutes or rules and regulations if they do not in any given instance, as a

matter of fact, obscure the required words and are actually separate and distinct from them, both physically and as to their meaning when read.

BOSTON RETIREMENT SYSTEM — CLERK OF THE MUNICIPAL
COURT OF THE ROXBURY DISTRICT.

A clerk of court is a public officer and not a mere employee.

A position whose tenure is fixed and limited is not a permanent position.

Under the statutes establishing the Boston Retirement System a clerk of court, having a limited term of office, is not a regular and permanent employee, and is not a member of the system subject to retirement at the age of seventy.

To the
Governor.
1925
August 25.

You have forwarded to me a notice from the Boston Retirement Board stating that at a meeting of the board held July 15, 1925, in accordance with the provisions of St. 1922, c. 521, § 9, "the retirement from active service of Maurice J. O'Connell, clerk of the Municipal Court of the Roxbury District of the City of Boston, was approved, to become effective at close of business, Friday, July 31, 1925." It appears that Mr. O'Connell refuses to accept the retirement. You ask me to advise you whether you should appoint a successor.

G. L., c. 218, § 8, so far as material, is as follows: —

Each district court, except the district courts of Nantucket and Dukes County, shall have a clerk, who shall be appointed by the governor, with the advice and consent of the council, for five years . . .

The power of appointment includes, of course, the power to fill vacancies. The question is whether there is now a vacancy in the office referred to. G. L., c. 30, §§ 8 and 10; *Attorney General v. Loomis*, 225 Mass. 372; *Donovan v. Board of Labor and Industries*, 225 Mass. 410. Cf. IV Op. Atty. Gen. 638.

The Boston Retirement Board was created by St. 1922, c. 521, which established the Boston retirement system. This act has since been several times amended. See St. 1923, c. 381, § 3; St. 1924, c. 251; St. 1925, cc. 18 and 90.

Section 5 of said chapter 521 provides that "all persons who are employees on the date when this retirement system is established may become members of the system," under certain conditions as therein stated. It also provides as follows: —

On and after January first, nineteen hundred and twenty-six, the services of an employee, not a veteran of the Civil war, of the Spanish war or Philippine insurrection or the World war as defined in section fifty-six of chapter thirty-two of the General Laws, or not a member of the judiciary or not a teacher, who attains or has attained the age of seventy and who is not a member of this system, shall terminate forthwith.

Section 9, as amended by St. 1924, c. 251, provides, in part, as follows: —

A member of this retirement system who shall have attained age seventy shall be retired for superannuation within thirty days, except members of the judiciary, heads of departments and members of boards in charge of departments, and except that a school teacher shall be retired on the thirty-first day of August following his attaining the age of seventy.

Said St. 1924, c. 251, § 4, also contains the following provision: —

Any head of a city department or member of a board in charge of a city department who has declined membership in the Boston retirement system may be admitted to membership therein upon written application to the Boston retirement board at any time within sixty days after this act takes effect, and shall, after being so admitted, receive credit for prior service notwithstanding any provision of said chapter five hundred and twenty-one.

The word "employee" is defined by section 2, as amended by St. 1923, c. 381, § 3, and by St. 1925, c. 18, as follows: —

"Employee" shall mean any regular and permanent employee of the city of Boston or county of Suffolk (except teachers who, on September

first, nineteen hundred and twenty-three, are employed by the city of Boston and are members of the state teachers' retirement association) whose employment is such as to require that his time be devoted to the service of the city or county, or both, in each year during one half or more of the ordinary working hours of a city employee, or any regular and permanent employee of this commonwealth whose compensation is wholly paid by the city of Boston or by the county of Suffolk, and the working superintendent and his employees of the index commissioners of the county of Suffolk.

By St. 1925, c. 90, §§ 2 and 3, employees who had not then become members of the retirement system were given a further opportunity, by making written application, to become members thereof. I understand that following the passage of this act Mr. O'Connell made such application and was recorded as a member prior to the action of the board on July 15th, and that he had reached the age of seventy years before the action of the board. Unless, therefore, Mr. O'Connell comes within the excepting clause of section 9, as amended, or unless his admission to membership was not authorized by the statute, a vacancy in the office now exists which should be filled by a new appointment.

In my judgment, a clerk of court is not a member of the judiciary nor the head of a department. A "member of the judiciary" or "judicial officer" is a person possessing judicial power. *People v. Wells*, 2 Cal. 198, 203; *Cleveland, etc. Ry. Co. v. People*, 212 Ill. 638; *Settle v. Van Evrea*, 49 N. Y. 280, 284. Cf. *Murphy v. Mayor of Boston*, 220 Mass. 73, 75. A clerk of court is a ministerial officer of the court, subject to the direction of the court in the performance of his duties. *Case of Supervisors of Election*, 114 Mass. 247, 250; *Cambridge Savings Bank v. Clerk of Courts*, 243 Mass. 424, 427. He possesses no judicial power. Nor is the clerk of a district court the head of a department in the sense in which that term is used in the statute. A district court is not such a department and certainly the clerk is not the head of it.

The remaining question, therefore, is whether Mr.

O'Connell, as clerk of the Municipal Court for the Roxbury District, became a member of the system by virtue of his application for membership; and that depends upon whether he was at the time an employee within the meaning of that word as used in the statute. If he was not such an employee, in my opinion he did not become a member of the system and was not subject to retirement although he had made written application for such membership.

"Employee," according to the definition, means "any regular and permanent employee of the city of Boston or county of Suffolk (with exceptions not material) . . . or any regular and permanent employee of this commonwealth whose compensation is wholly paid by the city of Boston or by the county of Suffolk . . ." The compensation of the clerk of the Municipal Court for the Roxbury District is wholly paid by the County of Suffolk. See G. L., c. 218, § 74. The question, therefore, whether Mr. O'Connell has been properly retired and whether there is a vacancy in the office of the clerk depends upon whether or not he was a regular and permanent employee either of the city, the county or the State.

The word "employee" is ambiguous. It may be used to include any person who receives pay for his services, or it may be used in a restrictive sense so as to exclude officers who exercise some part of the sovereign power. *Brown v. Russell*, 166 Mass. 14, 26; *Attorney General v. Drohan*, 169 Mass. 534; *Attorney General v. Tillinghast*, 203 Mass. 539. In an opinion rendered by this department to the Commissioner of Public Works, under date of May 8, 1920 (V Op. Atty. Gen. 547), in response to an inquiry whether or not the Commissioner and his Associate Commissioners were members of the State Retirement Association, it was held that the word "employee," as used in the State retirement act, did not include officers appointed by the Governor, with the advice and consent of the Council, for short and definite terms of a few years, and that the Commissioners, therefore, were not subject to the provisions of the act.

V Op. Atty. Gen. 576. Cf. III Op. Atty. Gen. 460; IV Op. Atty. Gen. 54, 105.

Following this opinion the Legislature enacted a statute, St. 1921, c. 439, amending the State retirement law by adding provisions to the effect that "an official under fifty-five years of age when appointed or reappointed by the governor for a fixed term of years, may, if his sole employment is in the service of the commonwealth, become a member of the association by making written application for membership . . .," and that "officials in the service of the commonwealth who are members of the state retirement association when this act takes effect, may, upon written application to the state board of retirement . . . withdraw their membership . . ."

The office of clerk of a court is, in my opinion, a public office as opposed to a public employment. In *Attorney General v. Tillinghast*, 203 Mass. 539, it was held that an assistant auditor of a city was a public officer, having entrusted to him some portion of the sovereign authority of the State, and not a mere employee. Important tests to determine the nature of a position were said to be whether its duration is defined by law or by agreement, whether it is created by appointment or election, on the one hand, or merely by contract of employment, on the other, and whether the compensation is fixed by law or by agreement. Under each of these tests the office of clerk of a court is a public office. See *People v. Brady*, 275 Ill. 261; *State v. Smith*, 153 La. 578.

Moreover, an employee, to come within the provisions of the statute, must be a "regular and permanent employee." "Permanent" means lasting or intended to last indefinitely. Century Dictionary. "Permanent employment" means employment for an indefinite time, which may be severed by either party. *Carnig v. Carr*, 167 Mass. 544; *Lord v. Goldberg*, 81 Cal. 596; *Sullivan v. Detroit, etc. Ry.*, 135 Mich. 661. A position whose tenure is fixed and limited by statute, in my opinion, cannot be said to be a permanent position.

St. 1921, c. 439, enacted after the Attorney-General's opinion rendered in 1920 (V Op. Atty. Gen. 576), accepted the construction of the retirement act given in that opinion and modified the previous law by permitting officials to become members of the State Retirement Association and to withdraw their membership. By the amendment to the Boston retirement law in St. 1924, c. 251, certain city officials are permitted to become members of the Boston retirement system. There is nothing in the statutes, however, which authorizes a clerk of a district court to become such a member.

It is my opinion that Mr. O'Connell was not an employee within the meaning of that word as defined in the Boston retirement act, that he did not become a member of the Boston retirement system, and that his services were not terminated under the provisions of that law. I advise Your Excellency, therefore, that there is no vacancy in the office of clerk of the Municipal Court for the Roxbury District of the City of Boston to be filled by appointment at the present time.

In giving this opinion I ought to point out that the question in another aspect involves a possible or probable controversy between the clerk and the county with respect to the payment of salary, and that this judicial question ought not to be decided without trial and argument, or prejudiced by my response to Your Excellency's inquiry regarding your power to make an appointment to the office of clerk. See *Opinion of the Justices*, 122 Mass. 600; VI Op. Atty. Gen. 438.

FIRE PREVENTION COMMISSIONER FOR THE METROPOLITAN
DISTRICT — STATE FIRE MARSHAL — FIRE COMMISSIONER
OF THE CITY OF BOSTON — DELEGATION OF
POWER — REVOCATION OF AUTHORITY.

The delegation of power by the Fire Prevention Commissioner for the Metropolitan District to the fire commissioner and his assistants of the city of Boston, under authority of St. 1914, c. 795, § 4, not having been revoked or modified, either by the Fire Prevention Commissioner or by the State Fire Marshal, who succeeded him under Gen. St. 1919, c. 350, whereby the powers of the Commissioner were transferred to the Department of Public Safety, is still in full force and effect.

To the Commissioner of
Public Safety.
1925
August 31.

You request my opinion on the following question: —

Is the delegation of power by the Fire Prevention Commissioner on the tenth day of September, 1915, to the fire commissioner of the city of Boston still in effect, said delegation not having been revoked or modified thereafter by the Fire Prevention Commissioner nor by the State Fire Marshal?

St. 1914, c. 795, § 4, invested the Fire Prevention Commissioner for the Metropolitan District of Massachusetts with certain powers, as follows: —

Power is hereby given to the commissioner to delegate the granting and issuing of any licenses or permits authorized by this act or the carrying out of any lawful rule, order or regulation of the commissioner or any inspection required under this act, to the head of the fire department or to any other designated officer in any city or town in the metropolitan district.

By virtue of the authority thus given, the then Fire Prevention Commissioner for the Metropolitan District, on September 10, 1915, granted the following delegation of power to the fire commissioner and his assistants of the city of Boston.

I, John A. O'Keefe, duly appointed and qualified Fire Prevention Commissioner for the Metropolitan District of Massachusetts, by virtue of the authority vested in me by Section four of Chapter seven hundred and ninety-five of the Acts of the year nineteen hundred and fourteen, do hereby delegate to the Fire Commissioner and his assistants of the

City of Boston, the following powers conferred on me by said Chapter, to be exercised by them within the said City of Boston, in accordance with the rules and regulations now established or hereafter to be established by the Fire Prevention Commissioner in reference severally to said powers. This delegation of power shall continue in force until a revocation thereof shall have been filed with the City Clerk of the said City of Boston.

1. The right to enter at any reasonable hour any building or other premises, or any ship or vessel, to make inspection, or in furtherance of the purpose of any provision of any law, ordinance, or by-law, or of any rule or order of said Fire Prevention Commissioner, without being held, or being deemed to be guilty of trespass; provided, that there is reason to suspect the existence of circumstances dangerous to the public safety as a fire menace.

2. The right to inspect and regulate in accordance with the rules established by the Fire Prevention Commissioner, the keeping, storage, use, manufacture, sale, handling, transportation, or other disposition, of gunpowder, dynamite, nitroglycerine, camphene, or any similar fluids or compounds, crude petroleum or any of its products, or any explosive or inflammable fluids or compounds, tablets, torpedoes, rockets, toy pistols, fireworks, firecrackers, or any other explosives, subject to the authority of the Building Commissioner to approve building construction.

3. The right to issue permits for the keeping, storage, use, sale or transportation of volatile inflammable fluids in quantity not exceeding one hundred and thirty gallons for private use, if said fluids are not to be used in connection with an unlicensed garage.

4. The right to approve or disapprove solely from considerations of fire hazard licenses for the keeping, storage, use, manufacture or sale of volatile inflammable fluids issued by the Board of Mayor and Street Commissioner, except so far as the Building Commissioner has authority to approve construction.

5. The right to inspect and regulate in accordance with the rules established by the Fire Prevention Commissioner, paint stores and paint shops within 50 feet of a dwelling-house.

6. The right to issue permits for the keeping, storage, use or sale of non-volatile inflammable fluids to the amount of two thousand five hundred gallons, provided a notice of the issuance of a permit which allows a total quantity in excess of 250 gallons at a certain location, is mailed at the time of issuance to the adjoining property owners.

7. The right to issue any permit required by Section 7 of said Chapter 795.

8. The right to issue all permits and exercise all authority, vested in the Fire Commissioner in the regulations now or hereafter adopted by the Fire Prevention Commissioner.

9. The right to require the removal and destruction of any heap or collection of refuse or débris that in his opinion may become dangerous as a fire menace, and all other powers conferred by Section 8 of said Chapter.

10. The right to require the keeping of portable fire extinguishing devices on any premises by the occupant thereof, and to prescribe the number and situation of such devices.

11. The right to cause obstacles that may interfere with the means of exit to be removed from doors, halls, stairways and fire escapes.

12. The right to order the remedying of any condition found to exist in or about any building or other premises, or any ship or vessel, in violation of any law, ordinance, rule or order in respect to fires and the prevention of fires.

13. The right to require at any time and regulate fire drills in theatres, public places of amusement, and public and private schools.

14. The right to require the enforcement of rules, orders and regulations of the Fire Prevention Commissioner.

In this delegation of power it is expressly set forth that "this delegation of power shall continue in force until a revocation thereof shall have been filed with the City Clerk of the said City of Boston." You state that this delegation of power has not been revoked or modified either by the Fire Prevention Commissioner or by the State Fire Marshal, to whose powers and duties he succeeded.

The office of fire prevention commissioner was abolished by Gen. St. 1919, c. 350, but the powers of the commissioner were expressly transferred to the Department of Public Safety established by the act, and particularly to the State Fire Marshal, an official of that department. Section 99 provides, in part, as follows: —

All the rights, powers, duties and obligations of the district police, said boards and said offices are hereby transferred to, and shall hereafter be exercised and performed by the department of public safety, established by this act, which shall be the lawful successor of the district police, and of said boards and offices.

Among the offices referred to is that of fire prevention commissioner. By section 101 a Division of Fire Prevention was created in the Department of Public Safety,

in charge of a director known as the State Fire Marshal, and by section 104 he succeeded to the duties of the former fire prevention commissioner, under the supervision of the Commissioner of Public Safety. It is expressly provided by section 6 that "all orders, rules and regulations made by any officer, board, commission or other governmental organization or agency which is abolished by this act shall remain in full force and effect until revoked or modified in accordance with law by the department which succeeds to the rights, powers, duties and obligations of such governmental organization or agency."

The precise question whether a delegation of power by the fire prevention commissioner to officers of cities and towns in the metropolitan district, unrevoked, remained in force after the passage of Gen. St. 1919, c. 350, was decided in the case of *Foss v. Wexler*, 242 Mass. 277, in which the court held that a gasoline license issued by the board of street commissioners of Boston in 1920 under a delegated authority from the Fire Prevention Commissioner for the Metropolitan District was valid, notwithstanding Gen. St. 1919, c. 350. On the authority of this case it is my opinion and I advise you that the delegation of power by the Fire Prevention Commissioner, dated September 10, 1915, to the fire commissioner of the city of Boston, not having been revoked, is still in full force and effect.

BOSTON ELEVATED RAILWAY COMPANY — BOARD OF TRUSTEES — TRUSTEE OF AN ESTATE HOLDING SHARES OF THE CAPITAL STOCK OF THE COMPANY — ELIGIBILITY TO APPOINTMENT AS A MEMBER OF THE BOARD OF TRUSTEES — OWNERSHIP OF STOCK.

A trustee of an estate holding shares of the capital stock of the Boston Elevated Railway Company is ineligible to qualify as a member of the board of trustees of the company until he divests himself of such ownership.

A trustee of an estate holding shares of capital stock in a corporation is vested with the legal title and with many of the rights and privileges pertaining to full ownership, and it is the duty of such trustee to act solely for the benefit of the beneficial owner of the stock.

To the
Governor.
1925
September 9.

You have orally requested my opinion as to whether a person who is one of several trustees of an estate which includes among its assets shares of stock of the Boston Elevated Railway Company may qualify as a trustee of that company under Spec. St. 1918, c. 159. Section 1 of that act provides, in part: —

The board of trustees of the Boston Elevated Railway Company is hereby created, to consist of five persons to be appointed by the governor, with the advice and consent of the council. The persons so appointed . . . shall own no stock or other securities of the Boston Elevated Railway Company or of any company owned, leased or operated by it.

The question is whether a person who holds shares of stock in the above described capacity is an owner within the purview of the act.

A trustee of an estate (and, if there are several trustees, each trustee) holding shares of stock in a corporation is vested with the legal title thereof and with many of the substantial rights and privileges pertaining to full ownership therein. Such trustee has a right, for example, to vote for directors at a stockholders' meeting of a corporation. It is his duty to act solely for the benefit and advantage of the beneficial owner of the stock. In the case of *Keith v. Maguire*, 170 Mass. 210, which arose under a statute requiring that the order of notice issued in foreclosure proceedings upon chattels held under a lien should be

served upon the "owner" of the chattels, the order of notice was served upon the bailor of the chattels and not upon the real owner. The court in that case said:

The word "owner" is not a technical term. It is not confined to the person who has the absolute right in a chattel, but also applies to the person who has the possession and control of it.

See, also, *Downey v. Bay State St. Ry.*, 225 Mass. 281.

The word "owner" in the statute relative to mechanics' liens has been construed to include the equitable owner as well as the person who holds the legal title. *Carey-Lombard Lumber Co. v. Bierbauer*, 76 Minn. 434; *Belmont v. Smith*, 8 N. Y. Super. Ct. (1 Duer), 675, 678.

It was undoubtedly the intention of the Legislature by the enactment of the foregoing provision that the public trustees of the Boston Elevated Railway Company, in the exercise of their functions as such, should be free and untrammelled from all personal or private considerations in the management of the company. It is conceivable that if a person who held shares of stock of the company as a private trustee of an estate were permitted also to act as a public trustee his duties as a private trustee holding corporate stock might conflict with his duty as trustee in the public management and operation of the corporation, resulting in a situation not wholly free from embarrassment and suspicion.

I am accordingly of the opinion that a person who holds shares of stock of the Boston Elevated Railway Company as a trustee or co-trustee of an estate is an owner of the stock of the company and is not eligible to qualify as a trustee under Spec. St. 1918, c. 159, unless and until he divests himself of the ownership of such stock.

INSURANCE — CONTRACTS OF PURE ENDOWMENT.

A corporation which issues a contract of pure endowment is to be considered a life insurance company, under G. L., c. 175, § 118.

If such a corporation is a foreign one and is not incorporated under the laws of its home State for the transaction of life insurance, it may not be admitted to do business in this Commonwealth, under G. L., c. 175, § 153.

To the Com-
missioner of
Insurance,
1925
September 15.

You have requested my opinion upon the three following questions relative to a form of contract described as a bond, a copy of which you have submitted: —

1. Does the said bond constitute a contract of insurance within the definition laid down in G. L., c. 175, § 2?

2. Is the corporation, by reason of issuing this bond, to be considered a life insurance company as defined in G. L., c. 175, § 118?

3. If you answer the preceding question in the affirmative, may this corporation be lawfully admitted to transact business in this Commonwealth as a life insurance company under section 153 of said chapter if it is not incorporated as an insurance company under the laws of the state of its domicile?

1. The bond is in effect a contract of pure endowment, with certain modes of deferred payment by way of annuities and endowments, of which the holder, at his option, may avail himself at the maturity of the instrument instead of taking the principal sum in cash, if he does not choose so to take it. See *Curtis v. New York Life Ins. Co.*, 217 Mass. 47.

I answer your first question in the negative.

2. It was decided in *Curtis v. New York Life Ins. Co.*, 217 Mass. 47, that a contract of pure endowment, although not within the definition of "a contract of insurance," as set forth in the statutes and now contained in G. L., c. 175, § 2, as amended, was yet a lawful contract and one which an insurance company was not prohibited from making. Since that decision the Legislature has specifically provided that both domestic and foreign life insurance companies may make pure endowment contracts. G. L., c. 175, §§ 119 and 152, as amended. Section 118, as amended, provides: —

Definition of life company. All companies doing business in the commonwealth under any charter, compact, agreement or statute of this or any other state, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities, shall be deemed to be life companies, and shall not make any such insurance, guaranty, contract or pledge in the commonwealth, or to or with any resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment and the consideration therefor, nor any such insurance, guaranty, contract or pledge the performance of which is contingent upon the payment of assessments made upon survivors; provided that corporations incorporated for any educational, charitable, benevolent or religious purpose shall not be deemed life companies and shall not be subject to this chapter. Nothing herein relating to the consideration for the policy shall apply to any extra compensation which may be charged by a company to the insured for engaging in military or naval service in time of war.

All life insurance hereafter transacted by the corporations which formerly issued policies on the assessment plan under chapter four hundred and twenty-one of the acts of eighteen hundred and ninety and acts in amendment thereof shall be carried on in accordance with this chapter; but such corporations may carry out in good faith their assessment contracts made with their members prior to July first, eighteen hundred and ninety-nine.

Considering this section with relation to companies selling annuities, which are there mentioned in the same clause with those selling endowments, the Supreme Judicial Court, in *Mutual Benefit Life Ins. Co. v. Commonwealth*, 227 Mass. 63, held that companies selling annuities, although an annuity is not strictly a contract within the statutory definition, were, nevertheless, in view of the wording of section 118 and the nature of annuities, to be deemed "life insurance companies" within the meaning of this section, and that such companies might be accurately described as "in the business of life insurance." The reasoning used by the court applies with equal force to companies issuing contracts of pure endowment as well as to other forms of endowment contracts specifically referred to by the court,

and to the instant contract with its options of extended endowment and annuity contracts.

I therefore answer your second question in the affirmative.

3. Although the foreign company issuing the contract under consideration is to be deemed to be a life insurance company, in accordance with the provisions of section 118, it is subject to section 153, which provides as follows: —

Conditions of admission of foreign life companies. A company organized under the laws of any other of the United States for the transaction of life insurance may be admitted to do business in this commonwealth, upon complying with section one hundred and fifty-one, if it has the requisite funds of a life company and, in the opinion of the commissioner, is in sound financial condition and has policies in force upon not less than one thousand lives in the United States for an aggregate amount of not less than one million dollars. Any such company organized under the laws of a state or government other than one of the United States may be so admitted if, in addition to fulfilling the above requirements, it complies with section one hundred and fifty-five and if it shall have and keep on deposit or in hands of trustees, as provided in said section one hundred and fifty-five and in section one hundred and fifty-six, in exclusive trust for the security of its contracts with policy holders in the United States, funds of an amount equal to the net value of all its policies in the United States and not less than two hundred thousand dollars.

If the company is not incorporated under the laws of its home State for the transaction of life insurance, it does not fulfil one of the essential conditions for its admission to do insurance business in this Commonwealth, and I answer your third question in the negative.

SOUTH ESSEX SEWERAGE BOARD — QUALIFYING OATHS —
CIVIL SERVICE.

Members of the board who are entitled to places thereon as incumbents of other offices under the Commonwealth are not required to take a qualifying oath. Employees of the board are not under civil service laws.

You have asked my opinion relative to the taking of qualifying oaths by the members of the South Essex Sewerage Board.

To the South
Essex Sewage
Board.
1925
October 5.

Each member of your board is a person chosen or appointed to an office under the government of this Commonwealth. The provisions of Mass. Const. Amend. VI make it necessary that before entering upon their duties the members of the South Essex Sewerage Board should take the required oath in the manner prescribed by law. Certain members of the board hold office as such because they are already incumbents of certain other designated positions or offices. St. 1925, c. 339, § 2. If a member is entitled to his place on the board because he is the incumbent of another office under the government of the Commonwealth, to which he has been chosen or appointed, and has taken the qualifying oath before undertaking the duties of the latter office, he need not take the oath again as a preliminary to the discharge of his functions as a member of the board. If, however, such a member has not previously taken the qualifying oath or his former office is not one under the government of the Commonwealth, so that it does not come under the terms of article VI, he must qualify by taking such oath in the manner prescribed by law, before entering upon his duties as a member of the South Essex Sewerage Board.

You have also asked my opinion as to whether or not the said board is subject to civil service requirements in its choice of employees. St. 1925, c. 339, § 3, provides, in part:

Said board shall from time to time appoint or employ such engineers, experts, agents, officers, clerks and other employees as it may deem neces-

sary, shall determine their duties and compensation, which shall be paid by the district, and may remove them at pleasure. . . .

The fact that the statute gives to the board the power to remove the various employees named therein at its pleasure indicates that it was not the intention of the Legislature that the Board or its employees should be subject to the requirements of the laws relative to civil service. VI Op. Atty. Gen. 152, 334.

RECLAMATION DISTRICT — ASSESSMENT UPON LAND OF
THE COMMONWEALTH.

Claim for a sum of money equal to an assessment upon a private proprietor may not be paid by an official on behalf of the Commonwealth under St. 1924, c. 395.

To the Com-
missioner of
Agriculture.
1925
October 8.

I have your letter of October 1st relative to the Assabet River Reclamation District, in which is situated certain land of the Commonwealth.

When the Commonwealth holds land within a reclamation district it is to be treated as one of the proprietors within such district, except that it is not subject to assessments upon its land, as are the other proprietors, under G. L., c. 252, as amended by St. 1923, c. 457. (See VII Op. Atty. Gen. 559).

Notwithstanding the fact that the Commonwealth has not made itself liable to pay assessments laid upon land by reclamation districts under the General Laws, it is within the authority of the Legislature to appropriate, for payment to a district, a sum of money equal to the amount which a private proprietor would have been called upon to pay on land of a similar character, if the Legislature determines that such a payment is for the general welfare.

The Legislature has not heretofore indicated an intention to appropriate sums of money for payments of the foregoing character. While a determination by the Legislature as

to such an appropriation might be brought about by the inclusion of a sum of money destined to be paid in lieu of an assessment upon land of the Commonwealth, in an item of the budget, in the absence of any indication of a legislative policy with relation to such payments there is no authority in any officer of the Commonwealth to pay or to agree to pay any sum in lieu of an assessment upon land of the Commonwealth, and the inclusion of such a sum in an item of the budget would seem to be inappropriate. The legislative intent with relation to payments of such a character should more properly be expressed by the passage of an act or resolve specifically appropriating a sum of money and authorizing its payment for the desired purpose.

I do not think that a claim for a sum of money equal to the amount of an assessment which might have been made against a private proprietor, had he been the owner of lands held by the Commonwealth, can be made against the Commonwealth under St. 1924, c. 395.

TAXES — INTEREST — COMPUTATION OF TIME — SUNDAY.

Under G. L., c. 59, § 57, all Sundays are included in the computation of the seventeen-day period after which interest shall be added to unpaid taxes.

You request my opinion as to whether interest is to be collected on local tax payments made prior to November 3, 1925, under the provisions of G. L., c. 59, § 57, with respect to addition of interest on all taxes remaining unpaid after the expiration of seventeen days from October 15th of each year. You state that the last day of the seventeen days, in the current year, falls on Sunday, November 1, 1925, and you inquire whether interest should be collected on taxes paid Monday, November 2, 1925.

G. L., c. 59, § 57, provides, with respect to the payment of interest on all taxes remaining unpaid after the expiration of seventeen days from October 15th, as follows: —

To the Commissioner of
Corporations
and Taxation.
1925
October 8.

Taxes shall be payable in every city, town and district in which the same are assessed, and bills for the same shall be sent out, not later than October fifteenth of each year, unless by ordinance, by-law or vote of the city, town or district, an earlier date of payment is fixed. On all taxes remaining unpaid after the expiration of seventeen days from said October fifteenth, or after such longer time as may be fixed by any city, town or district which fixes an earlier date for payment, but not exceeding thirty days from such earlier date, interest shall be paid at the following rates computed from the date on which the taxes become payable; at the rate of six per cent per annum on all taxes and, by way of penalty, at the additional rate of two per cent per annum on the amount of all taxes in excess of two hundred dollars assessed to any taxpayer, in any one city or town, if such taxes remain unpaid after the expiration of three months from the date on which they became payable, but if, in any case, the tax bill is sent out later than the day prescribed, interest shall be computed only from the expiration of such seventeen days or said longer time. In no case shall interest be added to taxes paid prior to the expiration of seventeen days from the date when they are payable, nor shall any city or town so fix an earlier date of payment and longer time within which taxes may be paid without interest as would permit the payment of any taxes without interest after November first of the year in which they are due.

The question presented is whether, in the computation of "seventeen days," any or all Sundays are included.

The rule for the computation of time, in the absence of a statutory expression of contrary intent, relative to the enumeration of intervening Sundays or of a Sunday when it is the last day of a period of time within which an act is to be done, has long been established in this Commonwealth.

Whenever the time limited by statute for a particular purpose is such as must necessarily include one or more Sundays, Sundays are to be included in the computation, even if the last day of the time limited happens to fall on Sunday, unless they are expressly excluded, or the intention of the Legislature to exclude them appears manifest.

Cooley v. Cook, 125 Mass. 406, 408. *Alderman v. Phelps*, 15 Mass. 225. *Thayer v. Felt*, 4 Pick, 354. This rule was restated in *Stevenson v. Donnelly*, 221 Mass. 161, 163, that "in computing any period of time less than a week,

Sunday is to be excluded; and that in computing any period of time of a week or more, Sunday is to be included."

The statute does not expressly exclude Sundays. There is nothing in the statute, by its nature or context, from which there appears an intention of the Legislature to exclude intervening Sundays. There appears no reason why the last of the seventeen days should be excluded if it happens to be Sunday, rather than any or all of the intervening Sundays during the time limited.

G. L., c. 4, § 9, relating to the performance of certain acts on a day after Sunday, provides as follows: —

Except as otherwise provided, when the day or the last day for the performance of any act, including the making of any payment or tender of payment, authorized or required by statute or by contract, falls on Sunday or a legal holiday, the act may, unless it is specifically authorized or required to be performed on Sunday or on a legal holiday, be performed on the next succeeding business day.

G. L., c. 59, § 57, requires that taxes shall be payable not later than October 15th of each year unless an earlier date is otherwise fixed. The provision relating to the seventeen-day period does not fix the period within which taxes shall be paid; it fixes a day, after the expiration of the period, on which interest shall be added to taxes already payable. As this provision does not require the performance of any act within the period of seventeen days, it is immaterial whether or not the last day of the period falls on Sunday.

As G. L., c. 59, § 57, manifests no expression to exclude intervening Sundays within the seventeen-day period or the last day of the period when it falls on Sunday, and as the payment of a tax is not an act the performance of which is required to be done within the seventeen-day period, under the law practised in this Commonwealth for many years, all Sundays are included in the enumeration of the seventeen days after October 15th.

You are advised, therefore, that interest should be collected on taxes paid Monday, November 2, 1925.

BOARD OF APPEALS — REVIEW OF DECISION AT INSTANCE
OF COMMISSIONER OF CORPORATIONS AND TAXATION
— AMENDMENT TO DECISION.

Under G. L., c. 63, § 71, as amended, providing that the decision of the Board of Appeal shall be final and conclusive as to questions of fact, its decisions are reviewable only by certiorari.

State officials acting in behalf of the Commonwealth cannot appear before the courts on opposite sides of a controversy and be represented by the Attorney-General.

A decision of the Board of Appeal, under G. L., c. 63, § 71, as amended, becomes final and conclusive when notice thereof is given as the statute requires, and may not thereafter be amended except for clerical and formal changes.

To the Com-
missioner of
Corporations
and Taxation,
1925
October 16.

You ask me to advise you whether the Commissioner of Corporations and Taxation should take any action to protect the rights of the Commonwealth by certiorari or otherwise with respect to the findings of the Board of Appeal, assuming that they were contrary to the evidence before the Board, in the matter of an appeal to the Board of Appeal from the refusal of the Commissioner to abate an excise tax assessed on a foreign corporation.

The Board of Appeal is constituted by G. L., c. 6, § 21, as follows:—

The state treasurer, the state auditor and a member of the council designated by the governor, shall constitute the board of appeal from decisions of the commissioner of corporations and taxation.

Provisions for taking an appeal from the decisions of the Commissioner to the Board of Appeal in respect to the assessment of corporation taxes are contained in G. L., c. 63, § 51, and § 71, as amended by St. 1921, c. 123, and St. 1922, c. 339, § 2. Said section 51 provides:—

Application for the abatement or correction of any tax assessed under sections thirty to fifty, inclusive, may be made within thirty days after the date upon which the notice of assessment is sent, and from the decision of the commissioner thereon any corporation may appeal in the manner provided by section seventy-one.

Section 71, as amended, provides:—

Except as otherwise provided, any party aggrieved by any decision of the commissioner upon any matter arising under this chapter from which an appeal is given, may apply to the board of appeal from decisions of the commissioner within ten days after notice of his decision. Said board shall hear and decide the subject-matter of such appeal, and give notice of its decision to the commissioner and the appellant; and its decision shall be final and conclusive as to questions of fact, although payments have been made as required by the decision appealed from. . . .

Section 71, as amended, provides, as quoted above, that the decision of the Board of Appeal “shall be final and conclusive as to questions of fact.” These words, however, do not prevent the use of certiorari by an aggrieved taxpayer to correct errors of law committed in proceedings before the Board. *Worcester v. Board of Appeal*, 184 Mass. 460; *Swan v. Justices of the Superior Court*, 222 Mass. 542; *Commissioner of Public Works v. Justice, Dorchester District*, 228 Mass. 12; *Bogigian v. Commissioner of Corporations and Taxation*, 248 Mass. 545. A writ of certiorari, however, will not lie to revise findings of fact (*Swan v. Justices of the Superior Court*, 222 Mass. 542, 546; *Commissioner of Public Works v. Justice, Dorchester District*, 228 Mass. 12, 16), and I know of no method other than certiorari by which the decision of the Board may be reviewed. The question whether the decision of the Board of Appeal was contrary to the evidence before them, in my opinion, therefore, is not reviewable.

There is an additional ground on which, as it seems to me, the Commissioner cannot in any event bring a petition for certiorari or other proceeding against the Board for the purpose of reviewing their decision on appeal from a decision of the Commissioner upon an application for abatement of a tax. This is because in such a proceeding the Commissioner and the Board would be adversary parties, both acting in their official capacity as representatives of the Commonwealth. See *Raymer v. Tax Com-*

missioner, 239 Mass. 410. The same person cannot be plaintiff and defendant in the same suit (*Warren v. Stearns*, 19 Pick. 73, 77; *Pierce v. Boston Five Cent Saving Bank*, 125 Mass. 593); and it would be unseemly that State officials acting in behalf of the Commonwealth should appear before the courts on opposite sides of any controversy. Moreover, the Attorney-General is required by statute to "appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth . . .," and "all such suits and proceedings shall be prosecuted by him or under his direction." G. L., c. 12, § 3. Pursuant to this statute the Attorney-General has appeared for the Board of Appeal in certiorari proceedings. *Worcester v. Board of Appeal*, 184 Mass. 460. Cf. *Weld v. Gas & Electric Light Commissioners*, 197 Mass. 556. He must also, and invariably does, represent the Commissioner of Corporations and Taxation in all litigated cases. He cannot, however, appear on opposite sides of any case. I must advise you, therefore, that the decision of the Board of Appeal in the matter you refer to cannot be reviewed by petition for writ of certiorari or other proceeding filed in your behalf.

It appears, from your statement, that at a meeting of the Board of Appeal held on May 27, 1925, it was voted in the matter of the appeal relating to the tax in question that for the purpose of the tax the gross receipts were determined to be a certain amount, that notice of this determination was given to the Commissioner under date of June 10, 1925, that at a subsequent meeting of the Board held July 31, 1925, it was voted to amend the previous vote by reducing the amount of the gross receipts as so determined, and that notice of this action was given to the Commissioner under date of August 1, 1925. You ask whether the Commissioner should proceed to collect the excise outstanding against

the corporation on the books of your department, or any part thereof.

G. L., c. 63, § 71, as amended, as quoted above, permits a corporation aggrieved by a decision of the Commissioner upon any matter relating to the assessment of an excise tax against it to appeal to the Board of Appeal, and requires that Board to "hear and decide the subject-matter of such appeal, and give notice of its decision to the commissioner and the appellant." It does not appear unequivocally from your statement that the determination of the amount of the gross receipts was a decision of the subject-matter of the appeal, nor does it appear that notice of this determination was given to the appellant. I assume, however, that the determination as expressed in the vote was intended to be and was in effect a decision of the whole subject-matter of the appeal, and that notice of this decision was given to the appellant as well as to the Commissioner.

The section provides that the decision of the Board of Appeal "shall be final and conclusive as to questions of fact." The word "decision" is defined as a judgment given by a competent tribunal. Bouvier's Law Dictionary. See *Coffey v. Gamble*, 117 Iowa, 545, 548; *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St. 543, 555. Like a judgment or adjudication it connotes finality. A judgment of a court, in the absence of statute, may generally be amended in matter of substance during the term because the sittings during the term are regarded as continuous and, as is said, the proceedings of the court remain in the breast of the judge until the expiration of the term. *Mason v. Pearson*, 118 Mass. 61; *Pierce v. Lamper*, 141 Mass. 20; *Radclyffe v. Barton*, 154 Mass. 157; *Powers v. Sturtevant*, 200 Mass. 519; *Karrick v. Wetmore*, 210 Mass. 578; *Bronson v. Schulten*, 104 U. S. 410, 415; *Wetmore v. Karrick*, 205 U. S. 141; *Baxter v. Buchholz-Hill Co.*, 227 U. S. 637; 34 C. J. 207, 232. There is nothing which corresponds to terms of courts in the sittings of such a tribunal as the Board of Appeal, and their sittings are not continuous but periodic. The

statute requires notice of the Board's decisions to be given to the parties interested, and makes those decisions final and conclusive as to questions of fact. It is my opinion that they become final and conclusive when due notice is given to the Commissioner and the appellant, and that thereafter they may not be amended except for the purpose of clerical and formal changes. In my judgment, therefore, and with the assumptions already stated, you should compute the tax upon the basis of the decision of the Board of Appeal of which you were notified under date of June 10, 1925.

MARRIAGE LICENSES — TOWN CLERKS.

Certificates may be issued upon filing of notices of intention although the parties are already legally married.

Where the validity of a previous marriage is doubted, town clerks must receive notices of intention and issue certificates thereon.

Town clerks have no discretion in regard to receiving notices of intention of marriage.

You ask my opinion upon the four following questions: —

1. Can there be more than one legal marriage ceremony, certification and record of the same marriage between the same parties?
2. If a marriage in another State or jurisdiction is doubted, can a notice of intention be accepted, a license issued, a marriage performed and a record made in this State as though there were no previous marriage?
3. Can a notice of intention be filed and a marriage license issued with the clerk or registrar when the parties are already married?
4. Must a clerk accept a notice of intention of marriage when one of the parties, although previously married, claims the same to be void in accordance with G. L., c. 207, § 8?

Town clerks are required to receive notices of intention of marriage in the form provided by the statutes. G. L., c. 46, § 1, and c. 207, §§ 19—21.

I therefore answer question 4 in the affirmative, and also questions 2 and 3 so far as they apply to the filing of notices of intention.

As to the issuance of certificates or licenses, it is provided

by G. L., c. 207, § 28, that "on or after the fifth day from the filing of notice of intention of marriage, except as otherwise provided, the clerk or registrar shall " issue a certificate.

The only statutory provisions which I have found, either forbidding or making non-compulsory the issuance of a certificate, are G. L., c. 207, §§ 32, 33, 35 and 50. Section 32 applies only to divorced persons; and in addition, the words "previously married" are not to be construed as meaning married to each other. See *Chase v. Chase*, 191 Mass. 166. Section 33 applies only to minors. Section 50 applies only to persons residing and intending to continue to reside in another jurisdiction. Section 35 provides that a clerk "may" refuse to issue a certificate if he has reasonable cause to believe that any of the statements contained in the notice of intention of marriage are incorrect. None of these provisions, accordingly, seems to prohibit the issuance of a certificate to persons who have previously married one another.

Of course, if the earlier marriage were valid the subsequent marriage is a nullity; and no doubt the Legislature did not intend to provide for a useless ceremony. But, on the other hand, if the earlier marriage were void the subsequent marriage is valid (*Schouler, Marriage and Divorce*, § 1197); and certainly it was not intended that parties should not have the usual means of marrying because of the fact that they had previously gone through a ceremony which was invalid. Rather, the law would seek on that account to provide them with a ready means of removing any question as to their status. If a town clerk believes that an earlier marriage is clearly invalid (and questions 2 and 3 do not assume the contrary), it seems to me that he may issue a certificate. And, if that is so, I do not believe it was intended that town clerks should have the discretion of determining, or be under the burden of passing upon, the validity of marriages.

I answer question 1 by saying that a marriage ceremony has no legal effect if the parties are already validly married,

but that there may be a legal record of such a second marriage. The record is nothing more than evidence of the marriage. G.L., c. 207, § 45. I answer your other questions in the affirmative.

ATTORNEY-GENERAL — DUTY TO ADVISE THE FINANCE
COMMISSION FOR THE CITY OF BOSTON — AUTHORITY
OF COMMISSION TO INCUR EXPENSE.

The Attorney-General will give advice to the Finance Commission for the City of Boston so far as it relates to the construction of the statutes creating and governing the commission.

The Attorney-General will not give advice concerning the duties of a city official who would not be bound by his opinion, nor concerning a judicial question which ought to be determined by the exercise of the judicial power.

The Finance Commission for the City of Boston is plainly authorized to incur reasonable expense for services of accountants employed in the performance of its duties.

To the Finance
Commission
of Boston.
1925
October 21.

You state that the city auditor of Boston has refused to approve a bill of public accountants for services rendered to your commission and approved by it. You refer to St. 1909, c. 486, amending the charter of the city of Boston, by which act the finance commission was created and by which the powers and duties of the commission and the powers and duties of the city auditor are defined. Pursuant to a vote of the commission you ask my opinion whether the city treasurer is not bound to pay the bills of the commission upon its requisition within the amount authorized by statute.

The position has been taken by former Attorneys-General with respect to your commission and with respect to the Police Commissioner for the City of Boston that advice would be given so far as it related to the construction of the statutes creating and governing such offices. IV Op. Atty. Gen. 451; V Op. Atty. Gen. 394. In this conclusion I concur.

St. 1909, c. 486, § 20, provides: —

The said commission is authorized to employ such experts, counsel, and other assistants, and to incur such other expenses as it may deem necessary, and the same shall be paid by said city upon requisition by the commission, not exceeding in the aggregate in any year the sum of twenty-five thousand dollars, or such additional sums as may be appropriated for the purpose by the city council, and approved by the mayor . . .

By subsequent statutes the limit of authorized expenditures has been increased to \$45,000. St. 1921, c. 81; St. 1924, c. 369. On the point which you raise this statute seems to me to involve no question of construction. Your commission is plainly authorized to incur reasonable expenses for the services of accountants employed in the performance of its duties.

Your further question, however, whether the city treasurer is not bound to pay the bills of the commission upon requisition of the commission, not exceeding the aggregate allowed, is one on which, in my judgment, I ought not to express an opinion for several reasons. In the first place, it seems to me to relate not to your duties but to the duties of a city official who would not be bound by any opinion which I might give. In the second place, it presents a judicial question which ought to be determined by the exercise of the judicial power in a suit between the parties interested. In such matters the Attorney-General will not express an advisory opinion. VI Op. Atty. Gen. 438. For these reasons I must respectfully decline to advise you further in the matter, leaving the question to await the outcome of legal proceedings if such become necessary.

DEPARTMENT OF PUBLIC HEALTH — REGULATIONS OF
UNITED STATES PUBLIC HEALTH SERVICE.

The Department of Public Health has no authority to use its facilities in enforcing regulations of the United States Public Health Service.

You request my opinion as to whether the Department of Public Health has authority to post placards prohibiting the use of water in certain railway stations, in accordance

To the Com-
missioner of
Public Health.
1925
October 26.

with paragraph 6 of Appendix A of the Interstate Quarantine Regulations of the United States. This paragraph reads as follows:—

6. Placards stating that the use of unsatisfactory water is forbidden will be posted over taps at stations through the State department of health having jurisdiction, where unfavorable certificates have been forwarded prohibiting the use of a water supply by a common carrier for drinking and culinary purposes in interstate traffic. On vessels, similar placards will be posted over taps by the United States Public Health Service.

The placards are supplied by the United States Public Health Service.

In my opinion, the Department of Public Health is given no authority under the statutes to use its facilities in enforcing this Federal regulation. G. L., c. 111.

TAXATION — CORPORATION TAX LAW.

The general principle that statutes are not to be interpreted as retroactive in operation in the absence of a plainly expressed legislative intent to that effect, is applicable to statutes amending previous statutes.

In the event that G. L., c. 63, § 52, becomes operative, the laws revived thereby are revived as they were at the time of the enactment of Gen. St. 1919, c. 355, and not with subsequent amendments thereto.

To the Com-
missioner of
Corporations
and Taxation.
1925
October 28.

You ask my opinion upon the following two questions:—

In the event that it is decided that G. L., c. 63, § 52, is operative, who is vested with authority to collect taxes assessed under the laws thereby revived?

Are the laws revived to be regarded as revived with any subsequent amendments thereto or revived as such laws stood at the time of the enactment of Gen. St. 1919, c. 355?

G. L., c. 63, § 52, provides, in part, as follows:—

If the excise imposed by section thirty-two on domestic business corporations, or that imposed by section thirty-nine on foreign corporations, is declared unconstitutional by a final judgment, order or degree of the

United States supreme court or the supreme judicial court of the commonwealth, sections thirty to fifty-one, inclusive, shall be null and void, and all laws repealed or made inoperative by chapter three hundred and fifty-five of the General Acts of nineteen hundred and nineteen shall thereupon be revived and continue in full force and effect as if the said chapter had not been enacted. In such case the commissioner and local assessors shall forthwith assess all taxes that have become due under such prior laws, . . .

Gen. St. 1919, c. 355, §§ 12 and 30, contain the following provisions relating to domestic business corporations and foreign corporations, respectively:—

SECTION 12. . . . Such parts of said chapter four hundred and ninety as amended, as relate to taxation of the corporate franchises of such domestic business corporations as are subject to this act, shall not apply to the said corporations.

SECTION 30. Those parts of the said chapter four hundred and ninety, as amended or supplemented, which relate to the taxation of the capital stock of such foreign corporations as are subject to the provisions of this act, shall not apply to the said corporations.

St. 1909, c. 490, pt. III, § 57, as amended by Gen. St. 1919, c. 349, § 20, is as follows:—

The tax commissioner shall annually, as soon as may be after the first Monday of August, give notice to the treasurer of every corporation, company or association which is liable to a corporate franchise tax under the provisions of sections forty-three and forty-four, of the amount thereof; that it will be due and payable to the treasurer and receiver general within thirty days after the date of such notice, but not before the twentieth day of October; and that within ten days after the date of such notice the corporation, company or association may apply to the tax commissioner for a correction of said tax, and in default of settlement, if application has been made as aforesaid, may be heard upon such application by the board of appeal.

This provision is continued with respect to corporations subject to taxation on their corporate franchises under G. L., c. 63, §§ 53–60, in G. L., c. 63, § 60, as follows:—

The commissioner shall annually, as soon as may be after the first Monday of August, give notice to the treasurer of every corporation, company or association liable to any tax under section fifty-eight, of the amount thereof, the time when due, the right to apply for correction, and the right of appeal, all as herein provided. Said tax shall be due and payable to the state treasurer within thirty days after the date of such notice, but not before October twentieth. The taxpayer may apply to the commissioner, within thirty days after the date of the notice, for correction of the tax, and if he so applies, may, in default of settlement, be heard on such application by the board of appeal.

Section 60 was amended by St. 1922, c. 520, § 9, so as to make the tax payable to the Commissioner instead of to the State Treasurer.

Gen. St. 1919, c. 355, does not expressly repeal any prior laws, but it does provide in sections 12 and 30 that those parts of St. 1909, c. 490, as amended, which relate to the taxation of domestic business and foreign corporations shall not apply to corporations subject to the provisions of Gen. St. 1919, c. 355. The effect then of Gen. St. 1919, c. 355, is to render inoperative the provisions of St. 1909, c. 490, as amended, with respect to certain corporations. St. 1909, c. 490, pt. III, § 57, as amended, is one of the provisions thus made inoperative with respect to such corporations. This section, except in so far as it is thus made inoperative, is continued in G. L., c. 63, § 60, which was amended by St. 1922, c. 520, § 9.

The question is whether or not St. 1922, c. 520, § 9, amending G. L., c. 63, § 60, is a part of the prior laws under which taxes are to be assessed by virtue of G. L., c. 63, § 52.

It is a general principle that statutes are not interpreted as retroactive in operation in the absence of a plainly expressed legislative intent to that effect, and this principle is applicable to statutes amending previous statutes. *Martin L. Hall Co. v. Commonwealth*, 215 Mass. 326, 329. See also *Fitzgerald v. Lewis*, 164 Mass. 495; *Tremont & Suffolk Mills v. Lowell*, 165 Mass. 265; *Wilson v. Head*,

184 Mass. 515; *Wheelwright v. Tax Commissioner*, 235 Mass. 584.

Section 25 of St. 1922, c. 520, provides that the act shall take effect on January 1, 1923. In my opinion, the amendment made by this statute, substituting the Commissioner for the State Treasurer as the officer to whom taxes imposed by G. L., c. 63, §§ 53-60, are to be paid, cannot be said to be a part of the prior laws made inoperative as to domestic business and foreign corporations by Gen. St. 1919, c. 355, and revived and continued in full force and effect by G. L., c. 63, § 52, upon the happening of the event referred to in that section. I therefore advise you that, in my judgment, the person vested with authority to collect taxes assessed under the laws revived by G. L., c. 63, § 52, is the Treasurer and Receiver General.

My answer to your second question is that the laws revived are revived as they stood at the time of the enactment of Gen. St. 1919, c. 355, and not with subsequent amendments thereto.

ATTORNEY-GENERAL — DUTY TO ADVISE THE POLICE COMMISSIONER FOR THE CITY OF BOSTON — REGULATIONS FORBIDDING POLITICAL ACTIVITIES.

The Attorney-General will advise the Police Commissioner for the City of Boston so far as such advice relates to the construction of statutes creating and governing his office, and no further.

Regulations forbidding police officers to solicit or make contributions for political purposes, to attend political gatherings except in the course of duty, or to sign nomination papers, would not contravene their political rights.

You ask my opinion in regard to the construction of a rule of the Police Department, and whether certain provisions existing and proposed in the rules and regulations are or would be in contravention of the constitutional rights of police officers.

The position was taken by a former Attorney-General that he would advise the Police Commissioner for the City

To the Police
Commissioner
of Boston.
1925
November 2.

of Boston in relation to his duties so far as such advice related to the construction of the statutes creating and governing his office, and no further. V Op. Atty. Gen. 394. His reasons for so doing are stated in IV Op. Atty. Gen. 451. I approve of the conclusion thus reached and will in general be governed accordingly. Your request for my opinion regarding the proper interpretation of one of the rules and regulations of your department, it seems to me, therefore, is clearly one which I should not attempt to answer.

The question whether such rules and regulations are in conflict with statutory and constitutional provisions, while it may not fall strictly within the limits of the rule adopted by the Attorney-General for his guidance, as stated above, may be said to call for the proper application of St. 1906, c. 291, § 10, providing that "the police commissioner shall have authority to appoint, establish and organize the police of said city and to make all needful rules and regulations for its efficiency," and corresponding provisions of prior statutes, and I think may properly be answered. In effect the question is whether regulations forbidding police officers to solicit or make contributions for political purposes, to attend political gatherings except in the course of duty, or to sign nomination papers, would contravene their constitutional rights. The complete answer to this question is found in *McAuliffe v. New Bedford*, 155 Mass. 216, 220, where the court said concerning a quite similar regulation: —

. . . There is nothing in the Constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control.

This condition seems to us reasonable, if that be a question open to revision here.

See also *Stone v. Smith*, 159 Mass. 413; *Commonwealth v. Libbey*, 216 Mass. 356; *Ashley v. Three Justices of Superior Court*, 228 Mass. 63, 81; *Lawrence v. Board of Registration*, 239 Mass. 424; *Duffy v. Cooke*, 239 Pa. St. 427.

TRUSTEES OF THE MASSACHUSETTS TRAINING SCHOOLS — RETURN OF A WARD.

The trustees of the Massachusetts Training Schools have power to secure the return of a ward who has escaped or who has violated the terms of his parole. This power is not impaired by the fact that the ward is out on bail upon another offence.

You request my opinion as to whether the trustees of the Massachusetts Training Schools have a legal right to secure the return, as in ordinary cases of violation of parole, of a ward who has been properly committed to one of the training schools and who has either run away or been placed on parole in due course, and who while on parole or still a runaway is brought into court charged with a new and separate offence, found guilty and released on bail pending an appeal.

To the Com-
missioner of
Public Welfare.
1925
November 2.

G. L., c. 120, § 21, provides, in part: —

They (the trustees) may release on parole, . . . They may, at any time until the expiration of the period of commitment, resume the care and custody of children released on parole and recall them to the school to which they were originally committed; . . .

Section 12 provides: —

A boy committed to the Lyman school or to the industrial school for boys or a girl committed to the industrial school for girls, who has escaped therefrom, or been released on parole and broken the conditions thereof, may be arrested without a warrant by a sheriff, deputy sheriff, constable or police officer and may be kept in custody in a suitable place

and there detained until such boy or girl may be removed to the school from which he or she escaped or was released.

By these provisions authority is clearly and specifically given to the trustees to secure the return of a ward who has escaped or who has violated the terms of his parole. Being released on bail after a conviction for another crime does not render a child, properly committed, immune from the provisions of sections 12 and 21, nor does it serve as a license to be at liberty pending the final disposition of the subsequent proceeding. I am accordingly of the opinion that your question should be answered in the affirmative.

NOTARIES PUBLIC — JUSTICES OF THE PEACE — ACTING
AS ATTORNEYS — DISQUALIFICATION BY INTEREST.

Notaries public and justices of the peace, not having been admitted to practice as attorneys, may not presume to act as such under cloak of their commissions. A personal interest in the subject-matter of a transaction, sufficiently direct, may disqualify such officer from acting officially in connection therewith. An interest of such officer's employer is not sufficient to work such disqualification.

To the
Governor
and Council.
1925
November 12.

My opinion is requested respecting the legality and propriety of certain practices of notaries public and justices of the peace.

There can, of course, be no question of the illegality of these officers holding themselves out or presuming to act as attorneys under the cloak of their commissions. It is plainly provided in G. L., c. 221, § 41, that any person who, not having been lawfully admitted to practice as an attorney at law, represents himself to be an attorney or counsellor at law or to be lawfully qualified to practice in the courts of the Commonwealth, by any means, or who undertakes to practice as such, is guilty of a criminal offence for which he may be fined or imprisoned. Conceivably, a statute which expressly prohibited notaries or justices from purporting to act as attorneys might have a more direct moral effect than the general provision to which I have just re-

ferred, but it would add nothing to the strength of the present prohibition unless some greater or additional penalty should be contemplated in case of such misconduct by these officers. A statute authorizing the removal of notaries or justices who are guilty of this offence would add nothing to the power already vested in you to remove them at your discretion. The scope of your powers in this respect has already been referred to in my letter of January 20, 1925. (Op. Atty. Gen. 580).

The other two problems to which you have directed my attention raise fundamentally the question whether an interest in the subject-matter of the transaction precludes a notary or justice from performing his official duties in connection therewith. I have not found any Massachusetts statute or decision which squarely bears upon this question. I presume that there are circumstances in which the personal interest of such an officer would be so direct as to render his action in connection therewith unlawful as well as unethical. It would seem to me, for example, improper for a notary public who should be the grantee of a deed to take himself the grantor's acknowledgment thereto; but, so far as the taking of oaths or acknowledgments and the protesting of commercial paper go, it has been for a great many years settled in practice that the fact that the notary's or justice's employer may be interested in the subject of the transaction is no impediment to his acting officially in connection therewith. See, for example, *Nelson v. First National Bank*, 69 Fed. 798, where it is held that the cashier of the bank which held the note in question might, as notary, properly protest the same. Of course, there may be statutes in some States which restrict action of this sort, but I should not expect to find very many of them.

The custom whereby notaries take acknowledgments or attend to the protesting of commercial paper where concerns of which they are the employees or officers are interested is of such long standing and so widespread that I think its propriety is not questioned in current thought. For

example, attorneys take the acknowledgments of their clients, or of persons dealing with their clients, to all sorts of instruments, and it is a great convenience that they should be able to do so. And it seems to me somewhat significant that there seem to be no Massachusetts decisions in which the propriety of such conduct has ever been brought in question. If the practice had been in fact attendant with many abuses, it seems as though the course of some litigation would have brought them to light.

I therefore say that the practice of notaries who are officials of banking institutions protesting commercial paper or acting in connection with other transactions in which such institutions are interested does not seem to me to be illegal, nor do I think that it can be deemed unethical except in the most abstract sense. As to the employees of insurance companies administering, as notaries, oaths upon affidavits taken in connection with the adjustment of claims, it seems to me that what I have just said is equally applicable. There is, however, this difference, that such affidavits have no greater legal effect than if the statement made therein were unsworn to, and that although the insurance companies may perceive some practical advantage in having sworn statements which may somehow carry greater weight with the persons making them, the request to be appointed a notary merely in order that such oaths may be administered might well receive less favorable consideration than where the acts contemplated have some legal necessity or significance.

TAXATION — INCOME TAX — AUTHORITY OF COMMISSIONER
WITH REFERENCE TO CERTAIN AGREEMENTS AS TO PAY-
MENT OF TAXES.

The Commissioner of Corporations and Taxation has no authority to decline to enter into the agreement which may be filed with him under the provisions of G. L., c. 62, § 1 (e).

G. L., c. 62, § 1 (e), contains the following provisions: —

To the Com-
missioner of
Corporations
and Taxation.
1925
December 1.

Dividends on shares of any partnership, association or trust, of the classes designated in paragraphs first and second of subsection (c), shall be subject to taxation under this section unless the trustees or managers thereof file with the commissioner, in such form as he determines, its agreement to pay to the commonwealth annually the tax imposed by subsection (d) and any tax imposed by section five.

You request my opinion whether under this provision the Commissioner has any authority to decline to enter into such agreement.

The word "agreement" is frequently used in a broad and popular sense to designate a promise or stipulation. *Marcy v. Marcy*, 9 Allen, 8; *Virginia v. Tennessee*, 148 U. S. 503, 518. In my opinion, it is used in subsection (e) as meaning a written paper, in the form prescribed by the Commissioner, by which the partnership, association or trust purports to agree to be taxed under subsection (d) and section 5. The Legislature in enacting subsection (e), in my opinion, intended to provide that upon the filing of such written document the partnership, association or trust should be taxed accordingly, and did not intend to provide that the Commissioner must either assent to or dissent from such agreement when filed. I therefore answer your question in the negative.

CONSTITUTIONAL LAW — GOVERNOR AND COUNCIL —
POWER OF APPOINTMENT.

Appointments required to be made by the Governor, with the advice and consent of the Council, may be acted upon either separately or collectively.

To the
Governor
and Council.
1925
December 4.
—

You ask my opinion whether nominations for major appointments, so called, such as judges, trustees and department heads, should be acted upon separately by the Council, or whether action may be taken under one motion for confirmation by the Council of nominations to such positions made by the Governor.

The power of appointment to various judicial, administrative and other positions is conferred by the Constitution and by the statutes of the Commonwealth upon the Governor, with the advice and consent of the Council. The Constitution provides, pt. 2nd, c. II, § III, art. I, that "the governor, with the said councillors, or five of them at least, shall and may, from time to time, hold and keep a council, for the ordering and directing the affairs of the commonwealth, according to the laws of the land"; and it is further provided, pt. 2nd, c. II, § III, art. V, that "the resolutions and advice of the council shall be recorded in a register, and signed by the members present; and this record may be called for at any time by either house of the legislature; and any member of the council may insert his opinion, contrary to the resolution of the majority." I am aware of no other provision, either in the Constitution or in the statutes of the Commonwealth, regulating the manner in which action by the Council shall be taken. In my opinion, it is wholly immaterial whether nominations are acted upon separately or collectively, so long as the result of such action is that the appointment of each individual whose name is presented to the Council is made with the advice and consent of the Council, as shown by the register kept in accordance with article V.

HIGHWAYS — APPROPRIATION — INTERPRETATION OF STATUTE.

It is a canon of statutory construction that a general act passed after a special act relating to the same subject-matter is not to be construed as an implied repeal of the special act without clear indication that it was the intention of the Legislature that the latter should supersede the former.

St. 1925, c. 288, providing for the creation of the Highway Fund, was not intended to repeal Gen. St. 1915, c. 221, § 5, as amended, under which money repaid to the Commonwealth by the counties in which highways were to be constructed was required to be expended by the Division of Highways without further appropriation.

You ask me to advise you if money paid to the Commonwealth under the provisions of Gen. St. 1915, c. 221, § 5, as amended by St. 1920, c. 572, and St. 1924, c. 203, is available for expenditure by the Division of Highways, as provided in said section 5, without further appropriation by the Legislature.

To the Commissioner of
Public Works.
1925
December 4.

Gen. St. 1915, c. 221, provides for the construction of certain highways in the five western counties. Section 1 directs the Massachusetts Highway Commission to construct during the years prior to 1919 certain highways in the five western counties, therein particularly described. Section 2 authorizes the Commission to expend a sum not exceeding two million dollars, and in addition thereto the sums of money repaid by the several counties under the provisions of section 5. Section 5 provides as follows: —

One fourth of any money which may be expended under the provisions of this act for a highway in any county, with interest thereon at the rate of three per cent per annum, shall be repaid by the county to the commonwealth in such instalments and at such times, within six years thereafter, as said commission, with the approval of the auditor of accounts, having regard to the financial condition of the county, shall determine. The money so repaid before November thirtieth, nineteen hundred and twenty-one, shall be expended by said commission from time to time, without specific appropriation, either in completing the highways hereinbefore mentioned or in improving a highway in any town in the five western counties that is not located upon one of the highways hereinbefore mentioned: *provided*, that the valuation of the town does not exceed one million dollars; the highway so improved

to be a main highway connecting such town with its railroad station, with a main through highway, or with an adjoining city or town.

St. 1920, c. 572, provides for the completion of the same highways. Section 1 authorizes the expenditure of an additional sum of one million dollars before November 30, 1924. Section 2 provides, in language similar to section 5 of the act of 1915, for the repayment to the Commonwealth, within six years, of one-fourth of any money expended under section 1 by the county, and for the expenditure by the Division of Highways of a sum equal to the money so repaid before November 30, 1926, without specific appropriation.

St. 1924, c. 203, amends section 2 of the act of 1920 by extending the time for expenditure of money repaid by the counties to November 30, 1928.

Your question whether money repaid by the counties under these statutes is available for expenditure by the Division of Highways without further appropriation by the Legislature is raised, as I understand it, by reason of St. 1925, c. 288, § 1, which provides for the establishment of a Highway Fund and amends G. L., c. 90, § 34, by striking out that section and inserting a new section 34, in part as follows:—

The fees and fines received under the preceding sections, together with all other fees received by the registrar or any other person under the laws of the commonwealth relating to the use and operation of motor vehicles, shall be paid by the registrar or by the person collecting the same into the treasury of the commonwealth, and said fees and fines, together with all contributions and assessments paid into the state treasury by cities, towns or counties for maintaining, repairing, improving and constructing ways, whether before or after the work is completed, and all refunds and rebates made on account of expenditures on ways by the division, shall be credited on the books of the commonwealth to a fund to be known as the Highway Fund. Said Highway Fund, subject to appropriation, shall be used as follows:

.

The section then provides that the fund is to be expended in carrying out the provisions of law relative to the use and operation of motor vehicles, the maintenance and construction of highways and other expenditures. By section 2 G. L., c. 81, § 23, is repealed.

The question is whether repayments by the counties, under the western highways acts, made after the passage of St. 1925, c. 288, were intended by the Legislature to be included in the terms of that act as "contributions and assessments paid into the state treasury by cities, towns or counties for maintaining, repairing, improving and constructing ways," so that such repayments must be credited to the Highway Fund and there held subject to appropriation by the Legislature.

G. L., c. 81, § 9, provides as follows: —

One fourth of any money, except money appropriated from motor vehicle fees and fines under section thirty-four of chapter ninety, which may be expended under any provision of sections four to eight, inclusive, and sections thirteen and fourteen, for a highway in any county, with interest thereon at the rate of three per cent per annum, shall be repaid by said county to the commonwealth in such instalments and at such times within six years thereafter as the division, with the approval of the state auditor, having regard to the financial condition of the county, shall determine.

There is no provision in this chapter for expenditure by the Division of money so repaid.

It is a canon of statutory construction that a general act passed after special acts relating to particular localities, and relating to the same subject-matter, is not to be construed as an implied repeal of the special acts without clear indication that it was the intention of the Legislature that the latter should supersede the former. *Brown v. Lowell*, 8 Met. 172; *Copeland v. Mayor and Aldermen of Springfield*, 166 Mass. 498, 504; *Boston & Albany R.R. Co. v. Public Service Commissioners*, 232 Mass. 358. In the *Copeland* case the court said: —

When special acts growing out of the peculiar wants, condition, and circumstances of the locality have been granted to a particular place, and afterwards a general law is passed having some of the same purposes in view, and extending them to places in which the special acts had no operation, whether the general act is an implied repeal of all repugnant special acts depends upon a careful comparison of the statutes and the objects intended to be accomplished, and, speaking generally, it requires "pretty strong terms in the general act, showing that it was intended to supersede the special acts, in order to hold it to be such a repeal."

In my opinion, the Legislature, in enacting St. 1925, c. 288, providing for the creation of the Highway Fund to be expended subject to appropriation, did not intend to repeal the provisions of the western highways statutes by which, in effect, there were appropriated for the construction of those highways, in addition to the specific sums named, such sums as the counties were required to repay to the Commonwealth, which the Division was directed to expend for that purpose without specific appropriation. St. 1925, c. 288, it seems to me, was intended to apply to the general provisions of G. L., c. 81, § 9, requiring the repayment by counties to the Commonwealth of a part of the money spent for highways therein, but making no provision for the use of money so repaid. I therefore answer your question in the affirmative.

CONSTITUTIONAL LAW — INITIATIVE PETITIONS — OBJECTIONS.

Objections to an initiative petition filed under Mass. Const. Amend. XLVIII must be finally determined before the petition is transmitted to the General Court, and if they are sustained the petition should not be transmitted.

To the
Secretary.
1925
December 10.

You state that on December 2, 1925, there was filed with you an initiative petition signed by 22,970 certified qualified voters and in apparent conformity with law. You state further that on December 4, 1925, objections were filed

to said petition under St. 1924, c. 302, of which you submit a copy.

Mass. Const. Amend. XLVIII contains the following provisions:—

THE INITIATIVE.

II. *Initiative Petitions.*

SECTION 3. *Mode of Originating.*— . . . All initiative petitions, with the first ten signatures attached, shall be filed with the secretary of the commonwealth not earlier than the first Wednesday of the September before the assembling of the general court into which they are to be introduced, and the remainder of the required signatures shall be filed not later than the first Wednesday of the following December.

SECTION 4. *Transmission to the General Court.*— If an initiative petition, signed by the required number of qualified voters, has been filed as aforesaid, the secretary of the commonwealth shall, upon the assembling of the general court, transmit it to the clerk of the house of representatives, and the proposed measure shall then be deemed to be introduced and pending.

V. *Legislative Action on Proposed Laws.*

SECTION 1. *Legislative Procedure.*— If an initiative petition for a law is introduced into the general court, signed by not less than twenty thousand qualified voters, a vote shall be taken by yeas and nays in both houses before the first Wednesday of June upon the enactment of such law in the form in which it stands in such petition. . . .

GENERAL PROVISIONS.

I. *Identification and Certification of Signatures.*

Provision shall be made by law for the proper identification and certification of signatures to the petitions hereinbefore referred to, and for penalties for signing any such petition, or refusing to sign it, for money or other valuable consideration, and for the forgery of signatures thereto.

St. 1924, c. 302, amends G. L., c. 53, by inserting the following new section:—

SECTION 22A. Objections that signatures appearing on an initiative or referendum petition have been forged or placed thereon by fraud

and that in consequence thereof the petition has not been signed by a sufficient number of qualified voters actually supporting such petition, as required by the constitution, may be filed with the state secretary not later than the sixtieth day prior to the election at which the measure therein proposed or the law which is the subject of the petition is to be submitted to the voters, except that, if a referendum petition is lawfully filed after the sixty-third day prior to said election, such objections may be filed not later than seventy-two week day hours succeeding five o'clock of the day on which such petition is so filed. If upon hearing or otherwise it appears to the state secretary that there is substantial evidence supporting such objections, he shall refer the same to the state ballot law commission, which shall investigate the same, and for such purpose may exercise all the powers conferred upon it relative to objections to nominations for state offices, and if it shall appear to said commission that the objections have been sustained it shall forthwith reject the petition as not in conformity with the constitution and shall notify the state secretary of its action.

You ask me to advise you whether the Secretary must act upon objections filed under the above statutory provision by determining whether there is substantial evidence supporting such objections, and, if so, referring the same to the State Ballot Law Commission before the petition is transmitted to the General Court; and whether, if the objections are so referred and it appears to the Commission that they have been sustained, the Secretary should transmit the petition notwithstanding such decision of the Commission.

I am clearly of the opinion that a final determination of the questions lawfully presented by such objections as have been seasonably filed must precede the transmission of the petition to the General Court, and that if such objections are sustained the petition should not be transmitted at all. The objections to the petition under St. 1924, c. 302, put in issue the question whether by reason of forgery or fraud affecting the validity of signatures the petition has been signed by a sufficient number of qualified voters, and that question must be first determined. If the petition has been signed by the required number of qualified voters it should be transmitted to the General Court; but

if not, it should not be so transmitted. Provision for the determination of that preliminary question is made in Mass. Const. Amend. XLVIII, General Provisions, I. If the question can be determined before the assembling of the General Court and the objections are not sustained, the Secretary will then be able to comply with the direction contained in The Initiative, II, § 4, to transmit the petition "upon the assembling of the general court." If, however, the action of the State Ballot Law Commission is not taken until a later date and the objections then are not sustained, the Secretary cannot do more than to transmit the petition to the General Court after the decision of the State Ballot Law Commission.

Respecting the form of protest submitted with your letter, the observation should be made that the only question to be considered either by you or by the State Ballot Law Commission is the question whether, by reason of forgery or fraud in the procuring of signatures to the petition, the petition does not bear the valid signatures of a sufficient number of qualified voters.

MEDICAL EXAMINATION OF PRISONERS — TRAVEL.

A physician who examines five prisoners, and who traveled only once to the jail for that purpose, is entitled to twenty cents per mile in only one of the cases. The statute authorizes payment only for each mile actually traveled one way.

You request my opinion whether a physician who, under the provisions of St. 1925, c. 169, examines five prisoners in one jail on the same day and who actually traveled only once to the jail for the purpose of making all of the examinations is entitled to twenty cents for each mile traveled one way in each of the five cases.

The act provides that "the physician making such examination shall . . . receive the same fees and traveling expenses as provided in section seventy-three for the examination of persons committed to institutions."

To the
Commissioner
of Mental
Diseases.
1925
December 19.

G. L., c. 123, § 73, provides that: —

The fee for each physician making a certificate shall be four dollars, and twenty cents for each mile traveled one way.

In my opinion, the word “traveled” does not refer to a theoretical travel and does not have the same meaning as the word “travel” in the statutes relating to fees of sheriffs and of witnesses for travel. See G. L., c. 262, §§ 8, 29 and 59. I am accordingly of the opinion that the statute authorizes payment of twenty cents for each mile *actually* traveled one way, and that the physician is entitled to twenty cents for each mile actually traveled in only one of the five cases.

DIVISION OF WATERWAYS AND PUBLIC LANDS — BACK BAY
LANDS — RELEASE OF RESTRICTION.

The Division of Waterways and Public Lands has no authority to execute a release of a restriction contained in a deed of the Commonwealth conveying land in the Back Bay.

To the Com-
missioner of
Public Works.
1925
December 21.

You ask my opinion whether the Division of Waterways and Public Lands can execute a release of a certain restriction contained in a deed of the Commonwealth conveying land in the Back Bay.

Under P. S., c. 19, § 3, the Board of Harbor and Land Commissioners was authorized to convey lands in the Back Bay in behalf of the Commonwealth. But this grant of authority was omitted from the statutes in the revision of 1902. See R. L., c. 96, § 3. The powers and duties relative to Commonwealth lands given to the Board of Harbor and Land Commissioners by this section are now assigned to the Division of Waterways and Public Lands. G. L., c. 91, § 2, expressly authorizes the Division to make conveyances, contracts and leases with respect to certain lands. There is, however, no provision in this section authorizing the Division to convey any title whatever

with respect to Back Bay lands; nor is there any other statutory provision, so far as I am aware, dealing with this subject. I must therefore advise you that, in my opinion, the Division is not authorized to execute such a release. See *Cotting v. Commonwealth*, 205 Mass. 523, 526; II Op. Atty. Gen. 479.

CORPORATION — CHANGE OF NAME — SECRETARY OF THE
COMMONWEALTH.

After approval has been duly given to a change of name by a corporation, and notice thereof duly published, the Secretary of the Commonwealth is required to grant a certificate of such change.

You have asked my opinion as to whether, under the circumstances set forth in a letter addressed to me, you are obliged to sign and issue a certificate of change of name to a corporation.

To the
Secretary.
1925
December 29.

It appears from your letter that, acting under G. L., c. 138, § 76, you had declared void the charter of a previously existing incorporated club having the same name as that now sought to be taken, by way of amendment, by an existing incorporated club; and that your action in relation to such previously existing corporation was taken four months prior to the submission to you of articles of amendment by the existing corporation, which by such amendment sought to change its name to that of the defunct corporation.

I assume that in relation to the voiding of the charter of the previously existing corporation you complied with all the requirements of the statute, and I also assume that all the requirements of G. L., c. 155, § 10, in relation to the adoption of the change of name by the existing corporation had been fully complied with.

You further state that you approved the certificate of change of name submitted by the new corporation, that the officers thereafter published notice of such change of

name, under your direction, and that proof of publication is now presented to you and you are requested to issue a certificate as to the change of name. I assume that such publication has been made, and that all acts required to be performed by the officers of the existing corporation have been done in due order.

After approval has been duly given to a change of name by a corporation and a notice thereof has been published, G. L., c. 155, § 10, provides: —

When the state secretary is satisfied that such notice has been published as required by him, he shall upon the payment of a fee of one dollar grant a certificate of the name which the corporation shall bear.

The granting of the certificate, after all the other acts required by section 10 have been duly performed and the Secretary has previously certified and indorsed his approval of the change of name, is not left to the discretion of the Secretary, but, when all the preliminary requirements of the statute have been fulfilled, is mandatory.

The preliminary determination as to the conformity of the change of name with the requirements of law requires the exercise of discretion upon the part of the Secretary, within the limitations of the statute. The requirements of law relative to the assumption of a name by a corporation, set forth in G. L., c. 155, § 9, appear to be applicable to the adoption of a new name by a corporation under section 10, in so far as they relate to the prohibition of the use of certain designated types of names. It is provided, among other matters, that a corporation "shall not assume the name of another corporation established under the laws of the commonwealth." It is evident, from a review of earlier statutes, that this prohibition refers to the names of existing corporations and does not include corporations once organized but which have ceased, by the annulment of their charters, to have any corporate life. The use of the name adopted by amendment by the existing corpo-

ration does not appear to fall within any other of the types of names whose use is prohibited. There does not appear to have been abuse of the power of the Secretary, discretionary or otherwise, in his approval of the proposed change of name.

In view of the foregoing considerations, I am constrained to advise you that upon payment of the required fee it will become your duty to grant a certificate of change of name to the existing corporation.

INDEX-DIGEST.

ABANDONMENT — Non-Support —
Cost 663
See INTERSTATE RENDITION. 2.

ABERJONA RIVER — Regulations —
Sewage 289
See COMMISSIONER OF PUBLIC
HEALTH. 1.

"ABODE" — Governor and Council —
Compensation for Travel . . . 700
See GOVERNOR AND COUNCIL. 2.

ABUTTING LAND — Private Ways —
Rights of Owners 259
See METROPOLITAN DISTRICT
COMMISSION. 1.

ACCIDENT INSURANCE — Group
Policies 413
See INSURANCE. 6.

AGRICULTURE, DEPARTMENT OF
— Oleomargarine — Inspection
— Peaceable Entry — Search
Warrant 182

Employees of the Department of Agriculture may, for the purpose of inspection, peaceably enter dwelling houses actually used in the manufacture, transportation or sale of oleomargarine.

Force may probably not be used to gain such entry.

When peaceable entry has been made, reasonable force may probably be used to make inspection.

A search warrant may not be issued to search for oleomargarine.

2. — Commissioner of Agriculture —
Inspection of Apples — Inter-
state Commerce. 537

The Commissioner of Agriculture has the right to inspect apples during the process of packing in this Commonwealth notwithstanding a declared intention by the owner to ship such apples to points outside of the Commonwealth.

ALIEN — Hawkers and Pedlers — Li-
cense 417
See HAWKERS AND PEDLERS. 2.

ALLOCATION OF INCOME — Taxa-
tion — Foreign Corporations . . . 216
See TAXATION. 5.

ANIMAL INDUSTRY — Quarantine
Stations — Tuberculin — Dispo-
sition of Diseased Animals . . . 456
Department Order No. 35 of the Depart-
ment of Conservation, Division of Animal In-

ANIMAL INDUSTRY — *Continued.*
dustry, created a valid quarantine of the premises of the Brighton Stock Yards Company in Brighton.

Quarantine is a proper means of enforcing the power of inspection and examination.

The tuberculin test may be applied without the owner's consent to imported cattle and to domestic cattle reported tuberculous on physical examination by a veterinary.

Quarantine stations established under G. L., c. 129, § 8, are experimental stations for the study of animal diseases.

Quarantine stations in Brighton, Watertown and Somerville, G. L., c. 129, § 32, are general quarantines to facilitate inspection, and the tuberculin test may be used upon cattle in such stations without the owner's consent.

Prior to St. 1924, c. 156, the sale of tuberculous animals was unrestrained, except that the owner must provide the buyer with certain information; after St. 1924, c. 156, sale or other disposition by the owner, except for immediate slaughter, is forbidden.

ANIMALS — Inspector — Approval by
Director of Animal Industry —
Board of Selectmen — Term of
Office 415

No nominee for the position of inspector of animals can be appointed until approved by the Director of Animal Industry.

A nomination made by a board of selectmen may be withdrawn by a new board of selectmen and another nominee named if no action has in the meantime been taken by the Director of Animal Industry with respect to the first nomination.

A former appointee holds over and can legally perform the duties of inspector of animals until the approval by the Director of Animal Industry of one nominated as his successor.

"ANTI-AID" AMENDMENT — Con-
stitutional Law — Playgrounds
— Lease of Park Lands by City . . 62

Legislation designed or framed to accomplish the ultimate object of placing property in the hands of one or more private persons after it has been taken by the superior power of the government from another private person, avowedly for a public purpose, is unconstitutional.

The Legislature may authorize the sale or lease of land held for a public purpose when the public purpose designed has been completely accomplished, or when through lapse of time or changed conditions continued ownership of the land by the public agency is no longer necessary or needed.

"ANTI-AID" AMENDMENT — *Continued.*

Land of a city or town held strictly for public uses as a park, and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court, which may transfer it to some other agency of government or devote it to some other public use.

Whether a statute appropriates property to a public use or to a private use is a judicial question, upon which the constitutionality of the act depends.

The advisability, necessity or expediency of passing legislation is a matter solely for the determination of the Legislature.

2. — **Constitutional Law** — Appropriation of Public Money for Private Purposes — Soldiers' Home — Civilian Employees — Civil Service Rules and Regulations — State Retirement System . . . 73

The Soldiers' Home is a privately owned charitable corporation, not a State institution.

Employees of the Soldiers' Home are not employees of the Commonwealth, and are not within the scope of the State retirement system, provided for by G. L., c. 32, §§ 1-5.

Employees of the Soldiers' Home are not "in the service of the Commonwealth," within the meaning of G. L., c. 31, § 3, and are not subject to the civil service rules and regulations.

A statute extending the State retirement system so as to include all civilian employees of the Soldiers' Home would authorize the employment of public money for private purposes, and would be unconstitutional.

A statute extending the State retirement system so as to include the civilian employees of the Soldiers' Home is not an appropriation "for the maintenance and support of the Soldiers' Home in Massachusetts," authorized by Mass. Const. Amend. XLVI, § 2.

3. — **Constitutional Law** — Reimbursement of Towns for Teachers' Salaries . . . 500

A school cannot be partly private and be the object of an expenditure of public funds.

The Punchard Free School in Andover is, on the facts, a public school.

A school may be in receipt of private aid without losing its public character.

Under G. L., c. 70, pt. I, a town may be reimbursed with respect of only those teachers' salaries which are in fact paid by the town.

- APPEAL** — Gasoline — State Fire Marshal — Powers — Appeal — "Person Aggrieved" — Revocation of Permits — Street Commissioners of Boston . . . 450
See STATE FIRE MARSHAL. 1.

2. — **Taxation** — Board of Appeal . . . 525
See TAXATION. 9.

- APPLE BOXES** — Standard Box for Farm Produce — Requirements as to marking Boxes — Use of Risers in packing Apples . . . 211
See RISERS.

- APPLES** — Commissioner of Agriculture — Inspection — Interstate Commerce . . . 537
See AGRICULTURE. 2.

- APPROPRIATION BILL** — Governor's Disapproval of Certain Items — Vote by House . . . 628

The Governor, in disapproving or reducing items in a general appropriation bill, is required to transmit his reason as to each item.

His act as to each such item is an independent act.

The House of Representatives is required to take a ye and nay vote on each item disapproved or reduced.

- ARMORERS** — Appointment as Special Police . . . 354

There appears to be no provision of law authorizing the appointment of armorers and assistant armorers in State armories as special police officers.

- ASSABET RIVER** — Assessment upon Land of the Commonwealth . . . 720
See RECLAMATION DISTRICT. 2.

- ASSESSMENT** — Sale of Stock for Non-Payment . . . 629
See TRUST COMPANIES. 3.

- ATTORNEY GENERAL** — Constitutional Law — Member of the Bar . . . 44

The office of attorney general is recognized by, and provided for in, the Constitution.

It is not within the province of the Legislature to add to or subtract from the qualifications for the office of attorney general required by the Constitution.

The qualifications for the office of attorney general established by the Constitution need not be established by express provision; they may be implied.

The Constitution contains the implied qualification that the attorney general shall be a member of the bar.

The Legislature may pass an act which merely expresses what in the Constitution is implied.

2. — **Duty to advise the Finance Commission for the City of Boston** — Authority of Commission to incur Expense . . . 730

The Attorney General will give advice to the Finance Commission for the City of Boston so far as it relates to the construction of the statutes creating and governing the commission.

The Attorney General will not give advice concerning the duties of a city official who

ATTORNEY GENERAL — *Continued.*

would not be bound by his opinion, nor concerning a judicial question which ought to be determined by the exercise of the judicial power.

The Finance Commission for the City of Boston is plainly authorized to incur reasonable expense for services of accountants employed in the performance of its duties.

3. — Duty to advise the Police Commissioner for the City of Boston — Regulations forbidding Political Activities . . . 735

The Attorney General will advise the Police Commissioner for the City of Boston so far as such advice relates to the construction of statutes creating and governing his office, and no further.

Regulations forbidding police officers to solicit or make contributions for political purposes, to attend political gatherings except in the course of duty, or to sign nomination papers, would not contravene their political rights.

4. — Legislative Printing — Clerks of the House and Senate . . . 561
See LEGISLATIVE PRINTING. 2.

ATTORNEYS — Notaries Public — Justices of the Peace — Acting as Attorneys . . . 738
See NOTARIES PUBLIC. 5.

AUTOMOBILE SERVICE — Contracts of Insurance — Service Contracts. 552

A contract to render services to the owner of an automobile, and to reimburse him for a portion of all expenditures for towing, is not a contract of insurance.

BACK BAY LANDS — Equitable Restrictions . . . 510

The restrictions in deeds from the Commonwealth against use for "any mechanical or manufacturing purposes" do not forbid the use of premises for offices or stores.

2. — Division of Waterways and Public Lands — Release of Restriction. 750

The Division of Waterways and Public Lands has no authority to execute a release of a restriction contained in a deed of the Commonwealth conveying land in the Back Bay.

BAIL BONDS — Furnishing of Bail Bonds by Surety Company — Sale of Powers of Attorney-in-fact . . . 473
See INSURANCE. 10.

BANKS AND BANKING — Trust Companies — Increase of Capital Stock — Amendment of Original Charter . . . 313
See TRUST COMPANIES. 2.

BLUE BOOK . . . 454
See CONSTITUTION. 1.

BOARD OF APPEAL — Delegation of Duties . . . 529

The duties of the State Treasurer and State Auditor as members of the Board of Appeal constituted by G. L., c. 6, § 21, are official duties, and during their illness, absence or other disability may be performed by their respective deputies, in accordance with G. L., c. 10, § 5, and c. 11, § 2.

2. — Review of Decision at Instance of Commissioner of Corporations and Taxation — Amendment to Decision . . . 724

Under G. L., c. 63, § 71, as amended, providing that the decision of the Board of Appeal shall be final and conclusive as to questions of fact, its decisions are reviewable only by certiorari.

State officials acting in behalf of the Commonwealth cannot appear before the courts on opposite sides of a controversy and be represented by the Attorney General.

A decision of the Board of Appeal, under G. L., c. 63, § 71, as amended, becomes final and conclusive when notice thereof is given as the statute requires, and may not thereafter be amended except for clerical and formal changes.

BONDS — Investments . . . 685
See SAVINGS BANKS. 4.

BOSTON — Listing Board — City Department . . . 38

The listing board of the city of Boston is not a city department, and is not subject to the ordinances of that city relative to printing and office supplies.

2. — City Council — Secretary . . . 566
See CIVIL SERVICE. 2.

BOSTON ELEVATED RAILWAY COMPANY — Constitutional Law — Impairment of Contract — Eminent Domain — Police Power — Eastern Massachusetts Street Railway Company . . . 11

The power to take property by eminent domain and the police power are sovereign powers which cannot be granted away by contract with the State.

Certain bills, if enacted, would be unconstitutional, for reasons stated in previous opinions.

A bill providing for the construction of a tunnel in Boston and a lease thereof to the Boston Elevated Railway Company, with a proviso that if the company does not consent thereto its elevated structures shall be removed without compensation, would, if enacted, be unconstitutional as an impairment of the contract contained in Spec. St. 1918, c. 159, and an arbitrary confiscation of the company's property.

A bill providing for an amendment of Spec. St. 1918, c. 159, to take effect on its acceptance by the Boston Elevated Railway Company, if

BOSTON ELEVATED RAILWAY COMPANY — *Continued.*

enacted, would be constitutional, under circumstances stated in the opinion.

Bills providing for the taking by eminent domain of property of the Eastern Massachusetts Street Railway Company and leasing the same to the Boston Elevated Railway Company would be constitutional, if enacted.

2. — Constitutional Law — Impairment of Contract — Requirement that Boston Elevated Railway Company keep in Repair Portions of Highways occupied by its Tracks 27

A statute requiring the Boston Elevated Railway Company to keep in repair the portions of highways occupied by its tracks, and exempting it from taxes imposed by G. L., c. 63, §§ 61-66, inclusive, would be constitutional.

3. — Public Control — Dividends "earned and paid" 363

Payments by the Commonwealth to the Boston Elevated Railway Company under Spec. St. 1918, c. 159, § 11, are to be treated as earnings in determining whether said railway company has "earned and paid" dividends within the meaning of G. L., c. 168, § 54, cl. 4th.

4. — Employees — Public Service — Preference of Veterans and Citizens 570

The service in which employees of the Boston Elevated Railway Company are engaged is not any branch of the public service of the Commonwealth.

Statutes containing provisions giving preference to veterans and to citizens of the Commonwealth with respect to their employment in the public service are not applicable to employment in the service of the Boston Elevated Railway Company.

5. — Board of Trustees — Trustee of an Estate holding Shares of the Capital Stock of the Company — Eligibility to Appointment as a Member of the Board of Trustees 714

A trustee of an estate holding shares of the capital stock of the Boston Elevated Railway Company is ineligible to qualify as a member of the board of trustees of the company until he divests himself of such ownership.

A trustee of an estate holding shares of capital stock in a corporation is vested with the legal title and with many of the rights and privileges pertaining to full ownership, and it is the duty of such trustee to act solely for the benefit of the beneficial owner of the stock.

6. — Liberty of Contract — Equal Protection of the Laws — Eastern Massachusetts Street Railway Company 331
See CONSTITUTIONAL LAW. 21.

BOSTON RETIREMENT SYSTEM —

Clerk of the Municipal Court of the Roxbury District . . . 704
See CLERK OF COURT.

- BREAD** — Inspection of Food — Label — Weight 702

Under G. L., c. 94, § 8, and the rules and regulations of the Director of Standards, requiring the weight of loaves of bread and the name of the manufacturer to be plainly stated on a wrapper or label, the wrapper or label may also contain any legend or design which does not obscure the required information and is actually separate and distinct.

- BRIDGE OVER HIGHWAY** — Ownership of Fee in Public Way 183
See CONSTITUTIONAL LAW. 20.

- BRIGHTON STOCK YARDS** — Quarantine Stations — Disposition of Diseased Animals 456
See ANIMAL INDUSTRY.

- BROKER** — Employment by the Commonwealth to negotiate a Sale of a Portion of the Commonwealth Flats 673

The power granted to the Division of Waterways and Public Lands by G. L., c. 91, § 2, to dispose of the lands known as the Commonwealth flats, includes by necessary implication the power to employ a real estate broker for the purpose of negotiating a sale, and to pay him compensation.

2. — Advance Payment of Premiums for Customers 487
See INSURANCE. 12.

- BROKER'S LICENSE** — Insurance — Fee 556

An applicant for an insurance broker's license is not exempt from payment of a fee because of previous service as a woman nurse in the United States Army.

2. — Fee — Veteran — Service in the Army or Navy of the United States "in Time of War or Insurrection" — Punitive Expedition into Mexico 172
See INSURANCE. 2.

3. — Insurance — Fee — War Service 254
See LICENSE FEE.

- BURDEN OF PROOF** — Constitutional Law — Criminal Cases 60

An act which provides, in substance, that after some material facts have been established in criminal cases, the burden of proof with respect to certain essential facts may, under certain circumstances, be placed upon the defendant, is constitutional.

BURIAL EXPENSES — Contagious Diseases — Overseers of the Poor — Local Boards of Health . . . 469

Where a local board of health has acted in a case involving a contagious disease deemed to be dangerous to the public health and reportable under G. L., c. 111, such board shall retain exclusive control of each such case until it is fully terminated. The responsibility of the board of health is not terminated by the death of a patient suffering from such disease, but necessarily includes the duty of supervising and providing for the proper burial of the patient.

CAPE COD CANAL — Construction of St. 1922, c. 462 — Directory or Mandatory . . . 287
See STATUTES. 1.

"CAPITAL STOCK" . . . 1
The words "the total amount of its capital stock," in G. L., c. 63, § 58, are intended to describe the amount of capital stock authorized, issued and paid in in cash.

So long as a trust company is not dissolved and is not prevented by the State itself from doing business, it is subject to the franchise tax imposed by G. L., c. 63, § 58.

2. — Trust Companies — Increase of Capital Stock — Amendment of Original Charter . . . 313
See TRUST COMPANIES. 2.

CARRIAGE STANDS — Police Commissioner — Powers — Rules and Regulations . . . 674
See POLICE COMMISSIONER. 2.

CASH VALUE — Insurance — Single Premium Deferred Annuity Policy . . . 435
See INSURANCE. 9.

CATTLE — Importation — Constitutional Law — Police Power — Restriction . . . 407

State laws requiring inspection of property intended for domestic use, passed for the protection of the public health, morals or safety, or to guard the public from fraud, are not open to attack as in contravention of the commerce clause of the Constitution of the United States unless they directly discriminate against interstate commerce or are inconsistent with Federal legislation under the commerce clause.

A statute providing that no cattle which react to the tuberculin test shall be shipped into the Commonwealth would be in direct conflict with national legislation contained in the Act of February 2, 1903, c. 349, § 1 (32 Stat. 791), and would therefore be invalid.

CERTIFICATION OF COPIES — Public Records — Secretary of the Commonwealth . . . 324
See PUBLIC RECORDS. 2.

CHANGE OF NAME — Corporation — Secretary of the Commonwealth. 751
See CORPORATIONS. 3.

CITIZENSHIP BY MARRIAGE . . . 692
See NOTARIES PUBLIC. 3.

CITY OFFICIALS — Constitutional Law — Election of City Officials — Proportional Representation . 619

A statute providing for the election of city officials in such a way as to permit the voters to express a choice between candidates in numerical order would violate no provision of the State Constitution.

CITY ORDINANCES — Approval of the Attorney General . . . 235
An ordinance of a city which has adopted Plan B as a plan of government, under Gen. St. 1915, c. 267, is not subject to the requirements of G. L., c. 40, § 32, and takes effect without the approval of the Attorney General.

CIVIL SERVICE — Promotion — Probationary Period . . . 37

The rule providing that no person "shall be regarded as holding office or employment in the classified public service until he has served a probationary period of six months," does not apply in the case of promotion from one grade of the classified civil service to the next grade.

2. — Secretary appointed by the City Council of Boston . . . 566

The appointment of a secretary by the city council of Boston, under St. 1909, c. 486, § 1, is not within civil service.

3. — Veteran — Service in the Army or Navy of the United States — Discharge from Draft . . . 194
See VETERAN. 2.

4. — Police Commissioner of Boston — Civil Service — Non-competitive Examinations . . . 228
See POLICE COMMISSIONER. 1.

5. — South Essex Sewerage Board — Qualifying Oaths . . . 719
See SOUTH ESSEX SEWERAGE BOARD.

CLERK OF COURT — Boston Retirement System — Clerk of the Municipal Court of the Roxbury District . . . 704

A clerk of court is a public officer and not a mere employee.

A position whose tenure is fixed and limited is not a permanent position.

Under the statutes establishing the Boston Retirement System a clerk of court, having a limited term of office, is not a regular and permanent employee, and is not a member of the system subject to retirement at the age of seventy.

CLERKS — HOUSE AND SENATE —

Legislative Printing — Attorney General . . . 561
See LEGISLATIVE PRINTING. 2.

CLINTON, TOWN OF — Metropolitan

District Commission — Cost of Water — Pipe Line Rental . . . 671

Under St. 1923, c. 348, the town of Clinton may take, without charge, water from any available pipe line leading from the Wachusett Reservoir.

No charge may be made for use of a pipe line which would indirectly be, or result in making, a charge for water.

Cost of water is in part determined by computing various items of expenditure necessary to conserve and make water available. Included in such items are interest upon capital investment, depreciation and cost of operation and maintenance.

The Commission may not charge an annual rental for use of a pipe line.

The Town of Clinton should pay expenses incurred as a result of the use of a pipe line by it which would not otherwise have been incurred.

CLUB CHARTER — Forfeiture — Intoxicating Liquors — "Conviction"

A charter of a club may be declared void by the Secretary of the Commonwealth only after conviction of a person for exposing and keeping for sale or selling intoxicating liquor on the club premises.

Only a final judgment is such conviction.

A plea of guilty and the placing of the case on file does not constitute such conviction.

A charter of a club may not be declared void upon conviction for maintaining a common liquor nuisance.

COLD STORAGE WAREHOUSE — Licenses

See PUBLIC HEALTH. 1. . . 190

COLLEGE — Public Ownership — Legislative Power to authorize a

Grant of Land by a City to the Trustees of a College . . . 616
See CONSTITUTIONAL LAW. 27.

COLLEGE DEGREES — Education —

Instruction by Professors of Institutions chartered under the Laws of a Foreign State . . . 157
See CONSTITUTIONAL LAW. 16.

COMMISSIONERS — Commissioners for Massachusetts in Other States and Foreign Countries

The duties of commissioners for Massachusetts in other States and foreign countries may be performed by persons other than the commissioners, and their appointment is not absolutely necessary.

COMMISSIONER OF CORPORATIONS AND TAXATION —

Review of Decision at Instance of Commissioner of Corporations and Taxation — Amendment to Decision . . . 724
See BOARD OF APPEAL. 2.

COMMISSIONER OF INSURANCE —

Discretion . . . 356
See INSURANCE. 5.

COMMISSIONER OF PUBLIC

HEALTH — Public Health — Aberjona River — Regulations — Sewage . . . 289

The word "sewage" as used in St. 1911, c. 291, includes filth from manufactories as well as from dwellings.

The Department of Public Health may prevent the discharge of sewage into the Aberjona River and its tributaries as well as the creation of a nuisance therein.

2. — Certified Milk — Foreign Supervision — Medical Milk Commissions

See MILK. . . 284

COMMISSIONER OF PUBLIC

WORKS — Registrar of Motor Vehicles — Approval of Increases in Salaries of Motor Vehicle Investigators . . . 272

The approval of the Commissioner of Public Works should follow the determination of increases in salaries of investigators and examiners appointed by the Registrar of Motor Vehicles before such increases are finally determined.

COMMONWEALTH FLATS — Employ-

ment by the Commonwealth of a Broker to negotiate a Sale of a Portion of the Commonwealth Flats . . . 673
See BROKER. 1.

COMMONWEALTH LAND — Authori-

ty to sell Certain Land Belonging to the Commonwealth . . . 557
See PUBLIC WORKS.

COMPENSATION — Pensions for Vet-

erans — "Compensation" . . . 646
See STATE RETIREMENT ASSOCIATION. 4.

CONCILIATION AND ARBITRATION

— Jurisdiction — Middlesex & Boston Street Railway Company 162

The question whether an employer, by entering into an agreement with his employees, had limited his right, as a matter of law, to discharge his employees, is a judicial question; and the Board of Conciliation and Arbitration has no jurisdiction, under G. L., c. 150, § 5, to take any action upon such question.

CONCURRENT SENTENCES — State Prison — Aggregate of the Minimum Terms 504
See STATE PRISON.

CONFIRMATORY DEED — Eminent Domain — Notice of Taking . . 57
Where land is taken by the Commonwealth by eminent domain, it is the duty of the board of officers who have made the taking to use reasonable diligence to ascertain the owners of the land taken, and to give notice of such taking to each and every owner thus ascertained.

CONSTITUTION — State Constitution — Blue Book 454
Mass. Const., pt. 2nd, c. VI, art. XI, does not require that the constitution be printed in the Blue Book.

2. — Rearrangement 377
See CONSTITUTIONAL LAW. 23.

3. — Governor and Council — Duties under the Constitution 624
See GOVERNOR AND COUNCIL. 1.

CONSTITUTIONAL LAW — Impairment of Contract — Eminent Domain — Police Power — Boston Elevated Railway Company — Eastern Massachusetts Street Railway Company 11

The power to take property by eminent domain and the police power are sovereign powers which cannot be granted away by contract with the State.

Certain bills, if enacted, would be unconstitutional, for reasons stated in previous opinions.

A bill providing for the construction of a tunnel in Boston and a lease thereof to the Boston Elevated Railway Company, with a proviso that if the company does not consent thereto its elevated structures shall be removed without compensation, would, if enacted, be unconstitutional as an impairment of the contract contained in Spec. St. 1918, c. 159, and an arbitrary confiscation of the company's property.

A bill providing for an amendment of Spec. St. 1918, c. 159, to take effect on its acceptance by the Boston Elevated Railway Company, if enacted, would be constitutional, under circumstances stated in the opinion.

Bills providing for the taking by eminent domain of property of the Eastern Massachusetts Street Railway Company and leasing the same to the Boston Elevated Railway Company would be constitutional, if enacted.

2. — Impairment of Contract — Requirement that Boston Elevated Railway Company keep in Repair Portions of Highways occupied by its Tracks 27

A statute requiring the Boston Elevated Railway Company to keep in repair the por-

CONSTITUTIONAL LAW — *Continued.*
tions of highways occupied by its tracks, and exempting it from taxes imposed by G. L., c. 63, §§ 61-66, inclusive, would be constitutional.

3. — Attorney General — Member of the Bar 44
The office of attorney general is recognized by, and provided for in, the Constitution.

It is not within the province of the Legislature to add to or subtract from the qualifications for the office of attorney general required by the Constitution.

The qualifications for the office of attorney general established by the Constitution need not be established by express provision; they may be implied.

The Constitution contains the implied qualification that the attorney general shall be a member of the bar.

The Legislature may pass an act which merely expresses what in the Constitution is implied.

4. — Interstate Commerce — Correspondence School — Agency 52

An institution chartered under the laws of a foreign State may come into Massachusetts for the purpose of enrolling students here for instruction by correspondence, and may grant such degree as it is authorized to grant under the laws of the State from which it receives its charter; and accordingly a State statute which makes it a condition precedent to a foreign corporation engaging in this branch of interstate commerce to obtain what practically amounts to a license to transact such business is unconstitutional, as a burden and restriction upon interstate commerce. But personal instruction within the confines of this Commonwealth by a resident agent of such foreign corporation is not interstate commerce, and is accordingly within the prohibition contained in G. L., c. 266, § 89.

A resident agent of a foreign correspondence school, who by advertisement holds himself out as empowered to grant a degree, violates G. L., c. 266, § 89.

5. — Criminal Cases — Burden of Proof 60

An act which provides, in substance, that after some material facts have been established in criminal cases, the burden of proof with respect to certain essential facts may, under certain circumstances, be placed upon the defendant, is constitutional.

6. — Public Money — Reimbursement 69

A proposed bill which authorizes the city of Boston to discharge its obligation to reimburse a certain company for losses sustained in certain coal deliveries is constitutional, inasmuch as the reimbursement is not a gift of the public money but is in the nature of compensation for value received by the city.

CONSTITUTIONAL LAW — Continued.

7. — "Anti-aid" Amendment — Appropriation of Public Money for Private Purposes — Soldiers' Home — Civilian Employees — Civil Service Rules and Regulations — State Retirement System 73

The Soldiers' Home is a privately owned charitable corporation, not a State institution.

Employees of the Soldiers' Home are not employees of the Commonwealth, and are not within the scope of the State retirement system, provided for by G. L., c. 32, §§ 1-5.

Employees of the Soldiers' Home are not "in the service of the Commonwealth," within the meaning of G. L., c. 31, § 3, and are not subject to the civil service rules and regulations.

A statute extending the State retirement system so as to include all civilian employees of the Soldiers' Home would authorize the employment of public money for private purposes, and would be unconstitutional.

A statute extending the State retirement system so as to include the civilian employees of the Soldiers' Home is not an appropriation "for the maintenance and support of the Soldiers' Home in Massachusetts," authorized by Mass. Const. Amend. XLVI, § 2.

8. — Criminal Cases — Public Trial 82

The right of persons accused of crime to have a public trial has always been recognized in this Commonwealth.

An act providing that the public be excluded from the trial of all criminal cases, or of all cases involving moral turpitude, would be unconstitutional.

Under certain circumstances, and in certain cases, the general public may be excluded.

An act providing that the general public be excluded from the trial of criminal cases involving morals or chastity, where a minor is the person upon whom the crime has been committed, would be constitutional.

9. — Jurisdiction over Non-residents — Operation of Motor Vehicles within the Commonwealth by Non-residents 88

A statute providing that the operation of a motor vehicle within the Commonwealth by a non-resident shall be deemed equivalent to an appointment of the Registrar of Motor Vehicles as an attorney upon whom service of process may be made in any action growing out of an accident or collision in which such non-resident may be involved while operating a motor vehicle within the Commonwealth, would be constitutional.

10. — An Act to ascertain the Will of the People — Eighteenth Amendment — Public Money 109

An act to ascertain the will of the people with reference to the Eighteenth Amendment to the Constitution of the United States, known as the "prohibition" amendment, and

CONSTITUTIONAL LAW — Continued.

with reference to the Federal statute known as the "Volstead act," would be constitutional.

Public money can be expended only for a public purpose.

The erection of town houses in which the inhabitants may assemble has been uniformly held to be a public purpose.

The right of the people peaceably to assemble and to discuss public topics is not confined to public meetings.

11. — Venue of Crimes — Jurisdiction — Vicinity 119

The word "vicinity," as used in article XIII of the Declaration of Rights, is not synonymous with "county."

Common law courts have inherent power to order a change of venue to secure an impartial trial.

An act providing that a defendant shall not be discharged for want of jurisdiction if the prosecuting officer, before trial, petitions for leave to proceed, stating that he is in doubt as to the court's jurisdiction, and the court orders him to proceed, and the evidence at the trial discloses that the crime was committed without the county or territorial jurisdiction of the court, is constitutional.

12. — Intoxicating Liquors — Federal Permit 123

An act providing that no person shall manufacture, transport, import or export intoxicating liquors or certain non-intoxicating beverages unless he shall have obtained the Federal permit required therefor by the laws of the United States, is constitutional.

13. — Disposition of Land no longer adapted to Public Uses — Public Charity — Impairment of Obligation of Contract — *Cy Pres* — Sale of Obsolete Property — Payment of Moneys received into State Treasury 129

Land acquired by the Commonwealth by eminent domain or through expenditure of public funds, held strictly for public purposes and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court, and may be transferred to an agency of the State government or devoted to some other public use by legislative mandate.

However, if land is subject to the terms of any gift, devise, grant, bequest or other trust or condition, the Legislature is not at liberty to dispose of the land or devote it to other purposes.

If it has become impracticable to administer a charitable trust according to its terms, a court of equity will exercise its power to devise some method of administering the charity *cy pres* to accomplish substantially the same result.

As an essential part of the duties of the Department of Public Welfare, it has the right

CONSTITUTIONAL LAW — Continued.

to dispose, by sale, of dead and dying timber on land under its control.

The moneys received from the sale of such timber must be paid into the State treasury, in compliance with Mass. Const. Amend. LXIII, § 1.

14. — Taxation — Excise Tax — Tax upon the Sale of Gasoline for Consumption in the Operation of Motor Vehicles upon the Highways of the Commonwealth . . . 132

House Bill No. 1520 imposes an excise tax upon the privilege of driving motor vehicles upon the public highways of the Commonwealth, and not upon the privilege of selling gasoline.

An excise tax upon the privilege of driving motor vehicles upon the highways of the Commonwealth, which contains a provision that "no provisions of this chapter shall apply . . . to interstate commerce, except in so far as the same may be permitted under the . . . constitution of the United States and the acts of Congress," is not in contravention of either the Federal or the State Constitution.

In an excise tax upon the privilege of driving motor vehicles upon the highways of the Commonwealth the amount of gasoline purchased for consumption in the operation of motor vehicles affords a fair criterion of the extent to which the highways are used, and the imposition of the tax upon the sale of gasoline for that purpose is a proper and convenient method of administration.

Quære, Whether an excise tax upon the privilege of selling gasoline generally would not be unconstitutional.

A tax imposed upon the sale of gasoline for consumption in the operation of motor vehicles is not an import duty, within the prohibition of U. S. Const., art. I, § 10.

15. — Arbitrary Discrimination — Class Legislation — Marketing Contracts between Co-operative Agricultural Associations and their Members . . . 139

A statute providing for the incorporation of co-operative agricultural associations without capital stock, authorizing the making of marketing contracts between such corporations and their members for the sale of their products for a certain period of time exclusively to or through the corporation, and providing that such contracts should not be construed as in violation of the anti-trust laws contained in G. L., c. 93, §§ 1-7, unless they resulted in undue enhancement of prices, would not be unconstitutional as making an arbitrary discrimination in favor of a particular class.

16. — Education — College — Degrees — Instruction by Professors of Institutions chartered under the Laws of a Foreign State . . . 157

The provisions of G. L., c. 266, § 89, preventing institutions chartered under the laws of a

CONSTITUTIONAL LAW — Continued.

foreign State from coming into Massachusetts for the purpose of enrolling students to receive personal class instruction here for which degrees are offered, even though the instructors are visiting professors from the institutions in question.

Such method of instruction is not interstate commerce within the principle laid down in the case of *International Textbook Co. v. Pigg*, 217 U. S. 91, and accordingly constitutes doing business within this Commonwealth, and therefore is subject to its laws.

17. — Police Power — Registration of Dealers in Milk . . . 164

The right of the Legislature, under the police power, to regulate the lawful business of individuals is subject to the limitations that it must be reasonable and not arbitrary, and that the regulation must be for the benefit of the public at large.

The question whether a statute interfering with the right to carry on business is a proper exercise of the police power is subject to judicial review.

A statute requiring persons engaged in the business of distributing milk to secure a rating by some credit agency, or to give a bond upon such terms as a State official may require, or to furnish a sworn financial statement of condition and to be subject to a public rating, as a prerequisite to doing business, would be unconstitutional, if enacted.

18. — Delegation of Legislative Powers to Administrative Officials — Unfair Discrimination — Regulation of Dealers in Milk and Cream . . . 169

An act authorizing the secretary of the Department of Agriculture to make such rules and regulations as he sees fit for dealers in milk and cream, without other limitation upon the power delegated than that such rules and regulations should be "in the interest of the public health and welfare," would amount to a delegation to an administrative official of the power to enact legislation, and would be contrary to the Constitution of Massachusetts.

An act for the regulation of dealers in milk and cream, that applies only to dealers "who buy, purchase, receive or collect said milk or cream to be sold, delivered or exposed for sale at a point more than six miles from the point of collection or receipt or purchase," makes an unreasonable and arbitrary discrimination, which would render the act unconstitutional.

An act, the dominant purpose of which is to impose restrictions upon milk dealers for the financial protection of milk producers, by requiring the former to secure a license and give a bond, the terms of which are wholly within the discretion of an administrative official, would be unconstitutional; that purpose being one which it is beyond the constitutional powers of the Legislature to effectuate.

19. — Drainage Law . . . 181

The power of the State to provide for the improvement of low lands and swamps and the

CONSTITUTIONAL LAW — Continued.

assessment of the expense on the owners, either in the exercise of the police power, where the benefits conferred are merely private, or in the exercise of the power of eminent domain and the taxing power, where a public purpose is served, has long been recognized.

20. — Bridge over Highway — Ownership of Fee in Public Way . . . 183

It is within the constitutional power of the Legislature to enact a law conferring upon a city or town within this Commonwealth the power to grant permits or privileges to private individuals to erect structures which will bridge the public streets connecting premises owned on both sides of the street.

The Legislature has the power to authorize encroachments upon a public street if they deem it proper so to do, whether the municipality or the person seeking the permit or consenting thereto owns the fee of the street.

21. — Liberty of Contract — Equal Protection of the Laws — Boston Elevated Railway Company — Eastern Massachusetts Street Railway Company . . . 331

Legislative power to secure the public safety, health and morals cannot be contracted away.

Certain bills, if enacted, would be unconstitutional, for reasons stated.

A bill forbidding the employment of aliens by the Boston Elevated Railway Company, if enacted, would be an infringement of liberty of contract and arbitrarily discriminatory, and would therefore be unconstitutional.

A bill requiring the Eastern Massachusetts Street Railway Company to maintain and keep in repair the portion of highways occupied by its tracks, if enacted, would be arbitrarily discriminatory, and therefore unconstitutional.

22. — Membership in Political Committees — Police Power . . . 350

Membership in a political committee belonging to a political party is not a public office, and may properly be regulated by the Legislature in the exercise of the police power.

A bill providing the State committees shall consist of one committeeman and one committeewoman from each senatorial district and a number of members at large, would be constitutional, if enacted.

23. — Rearrangement of the Constitution — Adoption of Rearranged Constitution . . . 377

Under the Constitution an amendment may be made by initiative petition, by legislative substitute and by legislative amendment.

The Legislature has no power to initiate a new or revised constitution.

The proposed rearrangement of the Constitution is not an amendment but a revision, and cannot, under the Constitution, be submitted to the voters by the Legislature.

CONSTITUTIONAL LAW — Continued.

24. — Ratification of Proposed Amendment to the Federal Constitution — Submission to the People for an Expression of Opinion . . . 445

An act to ascertain the opinion of the people of the Commonwealth as to the desirability of ratifying a proposed amendment to the Constitution of the United States, by submitting the question to the voters at a State election, would be constitutional.

25. — Taxation of National Banks and Other Moneyed Capital . . . 540

A tax on national bank shares at a rate uniform throughout the Commonwealth would not, in conjunction with the present system of local taxation, be constitutional under pt. 2d, c. 1, § 1, art. IV, of the Massachusetts Constitution.

Similarly of a corresponding uniform tax upon "other moneyed capital in the hands of individual citizens coming into competition with the business of national banks."

A tax upon such competing moneyed capital at the local property tax rate, with the exclusion of such capital from the Massachusetts income tax, would not offend against the Federal Constitution, nor, though more doubtfully, against Mass. Const. Amend. XLIV.

A tax upon the income of mercantile, manufacturing and business corporations, either as an excise or as an income tax under Mass. Const. Amend. XLIV, would be constitutional; but if imposed under that amendment, it must conform to its limitations.

A tax upon the income of national banks and other financial corporations at a rate lower than that upon the income of mercantile, manufacturing and business corporations would be constitutional, at least if imposed as an excise.

A tax upon the income of national banks under U. S. Rev. Stat., § 5219, cl. 1 (c), need not be at the same rate as the tax upon competing moneyed capital of individuals or co-partnerships.

26. — Exemption of Veteran Organizations from License Fees . . . 596

A statute exempting veteran organizations from paying a fee for licenses to keep billiard, pool or sippio tables or bowling alleys, while requiring a license fee of other keepers, would be unconstitutional because of its discrimination in favor of a certain class of citizens.

27. — Public Ownership — Legislative Power to authorize a Grant of Land by a City to the Trustees of a College — Statutory Construction . . . 616

The Legislature may authorize the transfer of public land to the trustees of a college, upon adequate compensation.

28. — Playgrounds — Lease of Park Lands by City . . . 62
See "ANTI AID" AMENDMENT. 1.

CONSTITUTIONAL LAW — Continued.

29. — Legislative Power as to Courts — District Judges sitting in the Superior Court . . . 189
See DISTRICT COURT JUDGES.
30. — Taxation of Legacies and Successions — Uniting Interests passing to One Beneficiary . . . 386
See TAXATION. 7.
31. — Undertakers — Licenses — Registered Embalmers . . . 400
See UNDERTAKERS.
32. — Police Power — Restriction of Importation of Cattle . . . 407
See CATTLE.
33. — Theatres — Regulation of Resale of Tickets . . . 442
See THEATRE TICKETS. 1.
34. — "Anti-aid" Amendment — Reimbursement of Towns for Teachers' Salaries . . . 500
See "ANTI AID" AMENDMENT. 3.
35. — . . . 594
See OPINIONS OF THE JUSTICES.
36. — Prohibition of Resale of Reduced Fare Railroad Tickets . . . 618
See RAILROAD TICKETS.
37. — Election of City Officials — Proportional Representation . . . 619
See CITY OFFICIALS.
38. — Right of Petition — Fee for filing Bill or Resolve . . . 632
See LEGISLATION.
39. — Protection of Reservations of Ways not laid out — Damages . . . 638
See WAYS.
40. — Municipal Corporation — Water furnished without Charge to a Private Concern . . . 641
See MUNICIPAL CORPORATION.
41. — Tax Sales — Nature of Title acquired . . . 644
See TAX SALES.
42. — Taxation — National Banks . . . 654
See TAXATION. 11.
43. — Initiative Petitions — Objections . . . 746
See INITIATIVE PETITION.

CONTAGIOUS DISEASES — Burial Expenses — Overseers of the Poor — Local Boards of Health . . . 469
See BURIAL EXPENSES.

CONTRACT — Public Work — Contract with Two or More Corporations, acting jointly — Partnership . . . 116

CONTRACT — Continued.

A contract for public work may not legally be made by the Commonwealth with two or more corporations, acting jointly.
Two or more corporations may not enter into a partnership.

2. — Infringement — Boston Elevated Railway Company — Eastern Massachusetts Street Railway Company . . . 331
See CONSTITUTIONAL LAW. 21.
3. — Insurance — Contracts made in a Foreign State . . . 668
See INSURANCE. 16.

CONVICTION — Forfeiture of Club Charter — Intoxicating Liquors . . . 361
See CLUB CHARTER.

2. — Registrar of Motor Vehicles — Revocation of License — New License — Appeal to Division of Highways . . . 513
See REGISTRAR OF MOTOR VEHICLES. 2.
3. — Motor Vehicles — "Subsequent Conviction" . . . 651
See MOTOR VEHICLES. 1.
4. — License to operate a Motor Vehicle — "Final Conviction" . . . 682
See MOTOR VEHICLES. 2.

CORPORATE RECORDS — Right to Inspect — Corporations — Stockholders . . . 79
See CORPORATIONS. 1.

CORPORATIONS — Stockholders — Right to inspect Corporate Records . . . 79

A proposed bill is constitutional which provides that, if an action for damages or a proceeding in equity is commenced for neglect or refusal to exhibit for inspection the stock and transfer books of a corporation, "it shall be a defence that the actual purpose and reason for the inspection sought are to secure a list of stockholders for the purpose of selling said list, or copies thereof, or of using the same for a purpose other than in the interest of the applicant, as a stockholder, relative to the affairs of the corporation."

2. — Taxation — Interpretation of Statute — "Net Income" . . . 86
Under the Federal Revenue Act of 1921, "net losses," as defined by section 204, are not deductible from "gross income" under sections 233 and 234, but are deductible from "net income" as defined by section 232.
"Net income," as defined by G. L., c. 63, § 30, par. 5, as amended by St. 1922, c. 302, means, with the modifications there specified, the net income required to be returned to the Federal government before the deduction of

CORPORATIONS — Continued.

any sum as an allowance for net losses, and such losses are therefore not deductible under the corporation tax laws.

3. — Change of Name — Secretary of the Commonwealth . . . 751

After approval has been duly given to a change of name by a corporation, and notice thereof duly published, the Secretary of the Commonwealth is required to grant a certificate of such change.

CORRESPONDENCE SCHOOLS —

Constitutional Law — Interstate Commerce — Agency . . . 52

An institution chartered under the laws of a foreign State may come into Massachusetts for the purpose of enrolling students here for instruction by correspondence, and may grant such degree as it is authorized to grant under the laws of the State from which it receives its charter; and accordingly a State statute which makes it a condition precedent to a foreign corporation engaging in this branch of interstate commerce to obtain what practically amounts to a license to transact such business is unconstitutional, as a burden and restriction upon interstate commerce. But personal instruction within the confines of this Commonwealth by a resident agent of such foreign corporation is not interstate commerce, and is accordingly within the prohibition contained in G. L., c. 266, § 89.

A resident agent of a foreign correspondence school, who by advertisement holds himself out as empowered to grant a degree, violates G. L., c. 266, § 89.

CORRUPT PRACTICES — Statements

of Political Expenses — Filing . . . 530
See POLITICAL EXPENSES.

2. — Election Laws — Returns of Candidates . . . 592
See ELECTION. 4.

COTTAGE FARM BRIDGE — Metro-

politan District Commission — Authority to construct Cottage Farm Bridge . . . 660

The authority given to the Metropolitan District Commission by St. 1921, c. 497, to construct the Cottage Farm Bridge is not subject to the approval of the Division of Waterways and Public Lands.

COUNTIES — Financial Year — Payments by Treasurer . . . 655

A county treasurer, after the close of a financial year, may pay bills as to which there has been a "special appropriation." He may not pay bills due in connection with the general annual appropriation for the past financial year.

COUNTY COMMISSIONERS — Elections — Primaries — Candidates 519

See ELECTIONS. 3.

COURTS — Legislative Power — Constitutional Law — District Judges sitting in the Superior Court . . . 189
See DISTRICT COURT JUDGES.

CREDIT INSURANCE — Contracts of Guaranty — Title Insurance . . . 532
See INSURANCE. 13.

CREDIT UNIONS — Small Loans — License . . . 159

A credit union is not engaged in the business of making small loans, within the meaning of G. L., c. 140, § 96, and is not required to obtain a license from the Commissioner of Banks.

CRIMES — Venue — Jurisdiction . . . 119
See CONSTITUTIONAL LAW. 11.

CRIMINAL CASES — Constitutional Law — Public Trial . . . 82

The right of persons accused of crime to have a public trial has always been recognized in this Commonwealth.

An act providing that the public be excluded from the trial of all criminal cases, or of all cases involving moral turpitude, would be unconstitutional.

Under certain circumstances, and in certain cases, the general public may be excluded.

An act providing that the general public be excluded from the trial of criminal cases involving morals or chastity, where a minor is the person upon whom the crime has been committed, would be constitutional.

CY PRES — Disposition of Land — Public Charity — Impairment of Contract — Sale of Obsolete Property — Payment of Moneys . . . 129
See CONSTITUTIONAL LAW. 13.

DEPENDENTS — Soldiers' Relief — Veteran — Honorable Discharge — Dishonorable Discharge . . . 225
See SOLDIERS' RELIEF.

DISTRICT ATTORNEYS — Traveling Expenses — Other Expenses . . . 393

Except in Suffolk County, traveling expenses of district attorneys and assistant district attorneys, necessarily incurred in the performance of their official duties, are to be paid by the Commonwealth and not by the county.

All other expenses necessarily incurred are to be paid by the county for the benefit of which they were contracted.

DISTRICT COURT JUDGES — Constitutional Law — Legislative Power as to Courts — District Judges sitting in the Superior Court . . . 189

It is within the constitutional power of the Legislature to modify, enlarge, diminish or transfer the jurisdiction of all courts subordinate to the Supreme Judicial Court.

An act providing that district judges shall sit at the trial of certain criminal cases in the Superior Court, when designated by the chief justice thereof, is constitutional.

DIVIDENDS 344
See SAVINGS BANKS. 3.

2. — Boston Elevated Railway Company — Dividends "earned and paid" 363
See BOSTON ELEVATED RAILWAY COMPANY. 3.

DOMICIL — Change of Domicil of Minor Child 466

The domicil of an infant whose father has died and whose mother has married again does not change with the mother's change of domicil, even though he accompany his mother to the new place of abode.

A widowed mother who has remarried cannot change the domicil of her minor child to another State, although she is also guardian by court appointment.

If such a mother were also testamentary guardian, it seems that she would have power to change the domicil of her minor child.

DRAINAGE LAW — Financial Improvement 526

A reclamation district organized under St. 1923, c. 457, under an arrangement whereby the expense of the improvement is to be apportioned between the district and the county, may not issue bonds for the purpose of financing the county's share of the undertaking, with the understanding that the district shall subsequently be reimbursed.

2. — 181
See CONSTITUTIONAL LAW. 19.

DRUG STORE — Registration and Permit — Peddling Patent Medicines and Drug Sundries 462

A registered pharmacist who maintains no fixed place of business but travels about selling patent medicines and drug sundries from an automobile truck, on the side of which is a sign containing his name and the words, "Registered Pharmacist. Everything in the Drug Line," is not conducting a "store" within the meaning of G. L., c. 112, § 38, as amended by St. 1921, c. 318, and accordingly is not required to obtain a permit as therein provided.

It seems that such a person would require a license for hawkers and pedlars under G. L., c. 101.

2. — Board of Registration in Pharmacy — Agent — Powers — Inspection of Drug Stores — Right to use Force — Taking of Samples 394
See PHARMACY, BOARD OF.

DUPLICATE LICENSES — Clerks of Towns 672

Clerks of towns issuing duplicate licenses under St. 1925, c. 295, have no authority to retain any portion of the fees paid for such duplicates.

EDUCATION — Pecuniary Interest in School Books — Principal of State Normal School 495

G. L., c. 15, § 5, providing that certain "agents, clerks and other assistants" appointed by the Commissioner of Education shall have no pecuniary interest in any school book used in public schools, does not apply to a principal of a State normal school.

2. — Teachers — State Aid 593
 Towns are not entitled to reimbursement, under G. L., c. 70, § 1, for salaries paid teachers, except as to salaries paid only for teaching and for teaching subjects authorized by G. L., c. 71, § 1.

3. — College Degrees — Instruction by Professors of Institutions chartered under the Laws of a Foreign State 157
See CONSTITUTIONAL LAW. 16.

EIGHTEENTH AMENDMENT — An Act to ascertain the Will of the People — Public Money 109
See CONSTITUTIONAL LAW. 10.

ELECTIONS — Registrars of Voters — Recount — Clerical Assistance — Guard Rail 7

Clerical assistants appointed under G. L., c. 54, § 135, may, under the supervision of the registrars of voters, do the actual counting of ballots at recounts.

Such assistants need not be sworn.
 There is no provision of law requiring that a guard rail shall be set up at the place of a recount of ballots.

2. — Presidential Primaries — Candidates for Delegates to National Party Conventions — Preferences 376

A nomination paper of a candidate for delegate to a national party convention at a presidential primary sufficiently states the preference of the candidate in accordance with G. L., c. 53, § 68, if it bears the words "pledged to . . ."

3. — Primaries — Candidates for County Commissioner 519

Under G. L., c. 54, § 157, providing for the election of two county commissioners for certain counties, not more than one of whom shall be from the same city or town, a candidate who has received at the primaries a smaller number of votes than another candidate of the same party from the same town cannot be a nominee, although he has received the second largest number of votes.

4. — Returns of Candidates 592

Where nothing has been "contributed, expended or promised" for political expenses by a candidate for election, a statement to that effect in his return must contain those or synonymous terms.

ELECTIONS — *Continued.*

5. — Constitutional Law — Election of City Officials — Proportional Representation . . . 619
See CITY OFFICIALS.

ELEVATORS — Inspection of Elevators in Private Residences . . . 492

The provisions of G. L., c. 143, §§ 62-71, apply to the inspection, installation and operation of elevators in private residences.

EMINENT DOMAIN — Police Power — Boston Elevated Railway Company — Eastern Massachusetts Street Railway Company . . . 11

The power to take property by eminent domain and the police power are sovereign powers which cannot be granted away by contract with the State.

Certain bills, if enacted, would be unconstitutional, for reasons stated in previous opinions.

A bill providing for the construction of a tunnel in Boston and a lease thereof to the Boston Elevated Railway Company, with a proviso that if the company does not consent thereto its elevated structures shall be removed without compensation, would, if enacted, be unconstitutional as an impairment of the contract contained in Spec. St. 1918, c. 159, and an arbitrary confiscation of the company's property.

A bill providing for an amendment of Spec. St. 1918, c. 159, to take effect on its acceptance by the Boston Elevated Railway Company, if enacted, would be constitutional, under circumstances stated in the opinion.

Bills providing for the taking by eminent domain of property of the Eastern Massachusetts Street Railway Company and leasing the same to the Boston Elevated Railway Company would be constitutional, if enacted.

2. — Notice of Taking to Parties in Interest — Confirmatory Deed . . . 57

Where land is taken by the Commonwealth by eminent domain, it is the duty of the board of officers who have made the taking to use reasonable diligence to ascertain the owners of the land taken, and to give notice of such taking to each and every owner thus ascertained.

Failure on the part of such board of officers to give the required notice to owners of land taken by eminent domain does not invalidate a taking.

A confirmatory deed given by the owner of land taken by eminent domain should include, among other requisites, a warranty to the extent of the amount of the award, and a provision that it is in confirmation, and not in derogation, of the rights acquired.

3. — Extent of Taking — Fixtures . . . 420

Floats used by a yacht club, and not attached to the land otherwise than by moorings, are personal property, and are not included in a taking of realty.

EMPLOYEES — Middlesex & Boston Street Railway Company — Board of Conciliation and Arbitration — Jurisdiction . . . 162

The question whether an employer, by entering into an agreement with his employees, had limited his right, as a matter of law, to discharge his employees, is a judicial question; and the Board of Conciliation and Arbitration has no jurisdiction, under G. L., c. 150, § 5, to take any action upon such question.

2. — Boston Elevated Railway Company — Public Service — Preference of Veterans and Citizens . . . 570
See BOSTON ELEVATED RAILWAY COMPANY. 4.**ENDOWMENT POLICY** — Contracts of Pure Endowment . . . 716
See INSURANCE. 19.**EVIDENCE** — Pharmacist — Narcotic Drugs — Prescriptions — Copies . . . 33

Under G. L., c. 94, § 198, a prescription for narcotic drugs, when filled, must be retained on file for at least two years by the druggist filling it, and no copy of such prescription shall be made except for the purpose of record by said druggist.

It follows that a druggist cannot be summoned to appear before a court and ordered to bring with him the original prescription for narcotic drugs; but since the prescription and the druggist's record are required by statute to be open at all times to inspection by the officers of the Department of Public Health, the Board of Registration in Pharmacy, the Board of Registration in Medicine, authorized agents of said department and boards, and by the police authorities and police officers of towns and cities, the statements and items contained therein may be shown by the testimony of any observer thereof.

EXPERT WITNESSES — Fees — Compulsory Process — State Officers and Employees . . . 326
See WITNESS FEES. 1.**EXTRADITION AND INTERSTATE RENDITION** — Fugitive from Justice — Physical Presence — Motive . . . 102

Before the Governor of an asylum State can lawfully comply with the demand for extradition, he must find as a fact that the accused is a fugitive from justice.

Physical presence in the demanding State at the time of the commission of the offence is necessary to constitute one a fugitive from justice.

The accused cannot be surrendered upon a theory of constructive presence.

The motive of the accused in leaving the demanding State is immaterial.

To constitute one a fugitive from justice it is not necessary that he should have done within the demanding State every act necessary to complete the crime.

**EXTRADITION AND INTERSTATE
RENDITION** — *Continued.*

2. — Fugitive from Justice — Duty to deliver up Fugitive from Justice 609

The duty to deliver up a fugitive from justice rests upon the Constitution and the laws of the United States.

It is the duty of the governor of an asylum State to deliver up the fugitive if he is the person demanded, if he was in the demanding State when the offence was committed, and if the papers are in proper form.

No discretion is vested in the governor of the asylum State.

A person is a fugitive from justice if he was in the demanding State at the time of the commission of the alleged offence and thereafter left the State.

The fugitive's motive in leaving the State is immaterial.

The governor of the asylum State cannot legally consider the question of guilt or innocence.

The governor of the asylum State cannot be compelled to honor a requisition.

3. — Desertion, Abandonment and Non-Support Cases — Cost — Results of Prosecution . . . 663

The average cost of requisition in desertion, non-support and abandonment cases was \$110.45. No defendant was acquitted.

Families of fugitives were directly benefited in more than eighty per cent of the cases.

Poor relief by communities has been saved. Deterrent effect upon potential offenders.

FARM PRODUCE — Standard Box for Farm Produce — Requirements as to marking Boxes . . . 211
See RISERS.

FEDERAL CONSTITUTION — Ratification of Proposed Amendment to the Federal Constitution — Submission to the People for an Expression of Opinion . . . 445
See CONSTITUTIONAL LAW. 24.

FEDERAL LAND—Jurisdiction of the Commonwealth and of the United States — Application of State Penal Statutes . . . 230
See JURISDICTION.

FEE — Constitutional Law — Right of Petition — Fee for filing . . . 632
See LEGISLATION.

FEES — Police Officer — Expenses of serving Warrant — Payment . . . 531
See POLICE OFFICER. 1.

FINANCE COMMISSION — Duty to advise the Finance Commission for the City of Boston — Authority of Commission to incur Expense . . . 730
See ATTORNEY GENERAL. 2.

FINANCES — Drainage Law — Financial Improvement . . . 526
See DRAINAGE LAW. 1.

FINANCIAL YEAR — Counties — Payments by Treasurer . . . 655
See COUNTIES.

FIRE HAZARD — License to maintain Garage and keep Gasoline — License Commissioners of Cambridge — State Fire Marshal — Right of Appeal . . . 293
See GASOLINE. 2.

FIRE PREVENTION COMMISSIONER — Metropolitan District — State Fire Marshal — Fire Commissioner of the City of Boston — Delegation of Power — Revocation of Authority . . . 710
See STATE FIRE MARSHAL. 2.

FIREARMS — Minors — Rifle Clubs . . . 161
Under G. L., c. 140, § 130, as amended by St. 1922, c. 485, § 8, rifle clubs made up of minors may be supplied with firearms and directed in their proper use by competent adult instructors, without violation of law.

2. — Practising Rifle or Pistol Shooting on Rifle Ranges on Sundays . . . 210
See NATIONAL GUARD.

FISH AND GAME — Artificial Ponds . . . 608
G. L., c. 130, § 59, forbidding the taking of a pickerel less than twelve inches in length, applies to artificial as well as to natural ponds.

2. — Certificate of Registration — Violation of Fish and Game Laws . . . 409
See HUNTING AND FISHING.

FISH PIER — Lease — Sublease . . . 464
A lease by the Board of Harbor and Land Commissioners to the Boston Fish Market Corporation of parts of the Commonwealth flats, under R. L., c. 96, § 3, gives to the lessee every right which it would have had if the lessor had been a person or private corporation.
A covenant in a lease that the lessee will not, without the consent of the lessor first obtained in writing, assign the lease is not a covenant against underletting, and will not be violated by the making of a sublease of a portion of the premises.

Under the lease referred to, the lessee has the right to sublet a portion of the premises for the storage of fuel oil and gasoline.

FISHING — Public Rights — Access — Prescriptive Rights — Colonial Ordinance of 1641-1647 . . . 262
See GREAT PONDS. 1.

FIXTURES — Eminent Domain — Extent of Taking . . . 420
See EMINENT DOMAIN. 3.

FOREIGN INSURANCE COMPANY —

Admission of Foreign Life Insurance Companies — Net Value of Policies . . . 679
See INSURANCE. 17.

FRATERNAL BENEFICIARY SOCIETY —

Mortuary Funds — Interest on Certain Loans . . . 240
See INSURANCE. 4.

FUGITIVE FROM JUSTICE —

Physical Presence — Motive . . . 102
See EXTRADITION AND INTERSTATE RENDITION. 1.

2. — Duty to deliver up Fugitive from Justice . . . 609
See EXTRADITION AND INTERSTATE RENDITION. 2.

GASOLINE —

Necessaries of Life — Construction of Statute — Special Commission on the Necessaries of Life . . . 244

The words "necessaries of life" mean literally things necessary to sustain life, and naturally connote commodities of prime importance, such as food, fuel, clothing and housing.

The words "necessaries of life," as used in Mass. Const. Amend. XLVII, have a broad and elastic meaning, the intention being that the powers thereby given to the Legislature should extend to such things as may be fairly termed "necessaries," from time to time, with the changing needs of the community.

The question whether gasoline was intended by the Legislature to be included in the class of "commodities which are necessities of life," as to which the special Commission on the Necessaries of Life was given certain powers and duties by St. 1921, c. 325, is a question of interpretation, involving a consideration of the language used and of the objects sought to be accomplished in that and other statutes where the same words have been used.

Gasoline, while it is an important factor in the transportation of necessities of life, is not itself a "necessary of life," within the meaning of St. 1921, c. 325.

Whether the sale of gasoline is a "business which relates to or affects" necessities of life, under St. 1921, c. 325, is a question of fact for the Commission to determine.

2. — License to maintain Garage and keep Gasoline — License Commissioners of Cambridge — State Fire Marshal — Commissioner of Public Safety — Right of Appeal — Matters for Consideration . . . 293

Under G. L., c. 148, § 45, an appeal lies to the State Fire Marshal from a decision of the board of license commissioners of Cambridge in granting a license to conduct or maintain a garage of the first class and to keep inflammable liquid in connection therewith, and, under G. L., c. 147, § 5, to the Commissioner of Pub-

GASOLINE — Continued.

lic Safety from a decision of the State Fire Marshal confirming such grant.

The State Fire Marshal and the Commissioner of Public Safety, in making decisions on such appeals, have the right to consider not only fire hazard but the inconvenience and annoyance of persons affected and the general good order and welfare of the community.

3. — State Fire Marshal — Powers — Appeal — "Person Aggrieved" — Revocation of Permits — Street Commissioners of Boston . . . 450
See STATE FIRE MARSHAL. 1.

GASOLINE TAX — Tax upon the Sale of Gasoline for Consumption in the Operation of Motor Vehicles upon the Highways of the Commonwealth . . . 132
See CONSTITUTIONAL LAW. 14.

GENERAL COURT — Eligibility of a Member to Other Employment by the Commonwealth — Salary 448

A member of the General Court is not eligible for other employment by the Commonwealth if his compensation for such other employment is "salary," or if such other employment in any way infringes upon the duties of the member as a legislator.

GOVERNOR — General Appropriation Bill — Governor's Disapproval of Certain Items — Vote by House 628
See APPROPRIATION BILL. 1.

GOVERNOR AND COUNCIL — Duties under the Constitution . . . 624

The duties of the Council, under the Constitution and the statutes, are to be performed in conjunction with the Governor, and consist in approving or disapproving his acts, or joining with him as an executive board.

When the Governor and Council act as an executive board, the Governor, as a member, may cast one vote; where the Governor acts with the advice and consent of the Council, each must act independently of the other and both must concur in order that action may be effective.

2. — Compensation for Travel — "Abode" . . . 700

The word "abode," as used in G. L., c. 6, § 4, providing that the Lieutenant Governor and each member of the Council shall be paid for travel from his abode and return his actual expenses as certified by him, means home or domicile and not place of temporary sojourn.

The amount to be paid is the amount actually expended for travel and not an arbitrary mileage.

3. — Power of Appointment . . . 742

Appointments required to be made by the Governor, with the advice and consent of the Council, may be acted upon either separately or collectively.

GRADE CROSSINGS — Abolition —
Right of Towns to a Refund from
the Commonwealth for Interest
paid . . . 319

St. 1914, c. 18, § 1, did not take away, as to
grade crossing debts incurred prior thereto, the
right of a town under St. 1908, c. 390, § 2, to a
refund from the Commonwealth of the excess
of the amount of interest paid by the town
over the actual cost to the Commonwealth for
money borrowed for the abolition of grade
crossings.

GRAND ARMY — Property of — Taxa-
tion — Exemption . . . 176
See TAXATION. 4.

GREAT PONDS — Title — Control —
Public Rights — Access — Fish-
ing — Prescriptive Rights — Co-
lonial Ordinance of 1641-1647 . . . 262

Great ponds are ponds containing in their
natural state more than ten acres.

Title to great ponds, not granted to towns or
appropriated to private persons prior to 1647,
is in the Commonwealth for the benefit of the
public.

Public rights in great ponds are not limited
to those mentioned in the Colonial Ordinance:
such ponds are devoted to such public uses as
the progress of civilization and the increasing
wants of the community properly demand.

Except during the period from 1835 to 1867,
prescriptive rights in great ponds could not be
acquired against the Commonwealth.

The Commonwealth and the public may ac-
quire prescriptive rights in ponds privately
owned.

Control of great ponds is in the Legislature.
There is now no public right to fish in cer-
tain great ponds containing twenty acres or
less.

Other public rights are not affected by the
statute relative to fishing.

The public has a right to reasonable means
of access to ponds containing more than twenty
acres, for the purpose of fishing.

The public, to gain access to great ponds for
the purpose of fowling, and possibly for some
other rights, where there are no public lands,
roads or rights of way, may pass and repass on
foot over unimproved and unenclosed lands.

2. — Structures — License . . . 316

A license is not required for a structure built
in the waters of a great pond unless it is below
the natural high-water mark.

GUARD RAILS — Registrars of Voters
— Recount — Clerical Assistance . . . 7
See ELECTIONS. 1.

HARVARD BRIDGE — Repair of Bridge
— Care and Control . . . 471
See METROPOLITAN DISTRICT
COMMISSION. 3.

HAWKERS AND PEDLERS — Agents
— License . . . 311

Under the provisions of G. L., c. 101, §§ 13,
14 and 18, no one may peddle under a license
except the person named therein. Accord-
ingly, if a sale is made by an agent or representa-
tive, he and not his principal must be licensed
to make such sale.

2. — License — Alien . . . 417

A local ordinance or regulation providing for
the licensing of hawkers and peddlers of fish,
fruit and vegetables, passed under authority
of G. L., c. 101, § 17, is void if it purported to
authorize the granting of a license to an alien
who has not declared his intention of becoming
a citizen of the United States.

HIGHWAY FUND — Appropriation —
Interpretation of Statute . . . 743
See STATUTES. 2.

HIGHWAYS — State Highways — Lay-
out . . . 402

Under St. 1922, c. 501, as amended by St.
1923, c. 481, providing for the laying out and
construction, by the Division of Highways, of a
highway in the city of Revere, the city cannot
be required to make the layout, and no part
of the cost may be assessed upon the county.

A way does not become a State highway,
under G. L., c. 61, until it has been "laid out
and taken charge of" by the division in behalf
of the Commonwealth.

Since St. 1922, c. 501, as amended, does not
require the division to take charge of the pro-
posed highway, it was not intended to provide
that the highway should be a State highway.

HOSPITAL EXPENSES — Contract of
Insurance — Bond . . . 567
See INSURANCE. 15.

HOURS OF LABOR — Women and Chil-
dren — Applicability of G. L.,
c. 149, § 56, to Laundries of Pri-
vate Boarding Houses and Hos-
pitals — Eight-hour Day — En-
gineers — Laundries at State
Hospitals . . . 145

G. L., c. 149, § 56, limiting the hours of
labor of women and children applies to laun-
dries of private boarding houses and hospitals,
and the hours or employment of women and
children, regularly and exclusively employed
therein, are limited as provided for in said § 56.

The service of engineers employed in State
hospitals, whose duties deal with furnishing
power to laundries, is restricted to eight hours
in any one day, and to forty-eight hours in any
one week, except in cases of extraordinary
emergency.

2. — Children — Regulation of Employ-
ment . . . 422

The provisions of G. L., c. 149, §§ 61, 62
and 65, regulating the employment of minors,
are applicable to minors when employed in co-
operating factories, manufacturing, mechani-

HOURS OF LABOR — *Continued.*

cal or mercantile establishments or workshops, unless such employment is in the course of receiving manual training or industrial education in an approved school, under G. L., c. 149, § 85.

A child between the ages of fourteen and sixteen employed in any such establishment is required by G. L., c. 149, § 86, to secure a special certificate.

3. — "Overtime Employment" — Legal Holiday 681

The words "overtime employment," as used in G. L., c. 149, § 56, as amended by St. 1921, c. 280, limiting the hours of labor of women and children in factories, requiring the posting of a printed notice giving a schedule of the hours for each week, and regulating overtime employment, mean employment at any time not included in the notice.

The hours of labor may include a part of Saturday afternoon, if so designated.

HOUSE AND SENATE — Legislative Printing — Clerks of the House and Senate 517
See LEGISLATIVE PRINTING. 1.

HUNTING AND FISHING — Certificate of Registration — Violation of Fish and Game Laws 409

Every certificate to hunt, trap and fish issued under G. L. c. 131, §§ 3-14, as amended, becomes void upon the conviction of the holder thereof of any violation of the fish and game laws, and no such certificate may be given to any person so convicted during the period of one year from the date of his conviction.

HUNTING AND TRAPPING — Constitutional Law — Criminal Cases — Burden of Proof 60
See BURDEN OF PROOF.

INCOME TAX — Gain received by Appointee under General Power 496
See TAXATION. 8.

2. — Authority of Commissioner with Reference to Certain Agreements as to Payment of Taxes 741
See TAXATION. 13.

INCOME TAX ACT — Interpretation 40

G. L., c. 62, § 1 (a), Third, excepting from the income tax interest from "loans secured exclusively by mortgage of real estate, taxable as real estate, situated in the commonwealth," should be construed as providing for the exemption of interest from loans secured by mortgage exclusively of real estate, taxable as real estate, situated in the Commonwealth.

Interest from a mortgage note, or an issue of mortgage bonds, endorsed by another person and secured by a mortgage of real estate situ-

INCOME TAX ACT — *Continued.*

ated and taxed in Massachusetts, is exempt from taxation by virtue of G. L., c. 62, § 1 (a), Third.

INCONTESTABILITY — Insurance — Form of Policy 688
See INSURANCE. 18.

INITIATIVE PETITION — Constitutional Law — Objections 746
Objections to an initiative petition filed under Mass. Const. Amend. XLVIII must be finally determined before the petition is transmitted to the General Court, and if they are sustained the petition should not be transmitted.

INSANE PERSONS — Requirements for Commitment — Medical Certificates of Insanity 626

But one medical certificate of insanity is required for the commitment of an insane person, either for observation or for permanent commitment.

A copy of the certificate, attested by the judge, should be delivered with the insane person to the superintendent of the institution to which such person shall have been committed, there to be kept on file with the order of commitment; and said superintendent should forthwith transmit to the Department of Mental Diseases copies of such certificate, of the order of commitment and of the statement required by G. L., c. 123, § 54.

INSPECTION OF FOOD — Label — Weight of Loaves of Bread 702
See BREAD.

INSURANCE — Joint and Several Liability of Two or More Companies — Use of Corporate Name of more than One Insurance Company at the Head of a Policy 71

A policy of insurance on which two or more companies are jointly and severally liable may not be issued except when specifically authorized by statute.

A contract of insurance must be headed or entitled only by the name of the company issuing the policy.

2. — Broker's License — Fee — Veteran — Service in the Army or Navy of the United States "in Time of War or Insurrection" — Punitive Expedition into Mexico 172

An applicant for an insurance broker's license under G. L., c. 175, § 166, is not exempt from paying the fee prescribed by said section, on the ground that he was a member of the Massachusetts National Guard, which was in the service of the Federal government during the punitive expedition into Mexico in 1916.

Such service does not constitute service in the Army or Navy of the United States "in time of war or insurrection," within the meaning of said statute.

INSURANCE — Continued.

3. — Policies to Tobacco Growers for Damage by Hail — Difference in Cost of Policies to Different Persons, based on Membership or Non-membership in an Association of Tobacco Growers — Rebates 214

G. L., c. 175, § 182, prohibits the giving by an insurance company of a lower rate to certain insureds merely because the favored insureds are members of a particular association.

There may be an allowable difference in rates for policies to tobacco growers, if it is based upon a reasonable mode of classifying the insureds.

4. — Fraternal Benefit Society — Mortuary Funds — Interest on Certain Loans 240

A fraternal benefit society may not, under G. L., c. 176, place a portion of its mortuary fund in a separate fund and then disburse it for expenses incidental to the growth or strengthening of the society.

Interest due upon money borrowed by a fraternal benefit society for its death fund is an item of expense which, under G. L., c. 176, should be repaid from the expense account of such society.

5. — Right of Domestic Mutual Companies to transact Lawful Forms of Business in Addition to those specified in their Charters — Authority of Commissioner of Insurance 356

The Commissioner of Insurance does not possess a discretion as to issuing or withholding an express license to a domestic mutual company to transact a lawful form of insurance business in addition to those specified in its charter and additional to those mentioned in G. L., c. 175, § 47. If the proposed form of insurance business is lawful, and the terms and conditions for its transaction, laid down by the Commissioner, are complied with, the company is entitled to such express license as a matter of right.

6. — Accident Insurance — Group Policies 413

Group or blanket policies against loss resulting from accidental injuries are not authorized under the provisions of the statutes, except such as are within the provisions of G. L., c. 175, §§ 110 and 133, as amended.

7. — Laundry Insurance — Bond — Rebate 426

A foreign insurance company not authorized to transact the kinds of business specified in the first, second or eighth clauses of G. L., c. 175, § 47, cannot insure a laundry company against hazards necessarily incidental to such kinds of business, but may, under section 105, execute, as surety, a bond to protect the customers against the default of the laundry company to pay losses from such hazards.

INSURANCE — Continued.

A retention of a portion of the service charge made by the laundry company for the payment of premiums does not, under certain circumstances, constitute an unlawful rebate.

8. — Investment of Funds of Domestic Life Companies — Securities of Equipment Trusts 431

G. L., c. 175, § 66, does not prohibit a domestic life insurance company from investing one-quarter of its reserve in the notes of an equipment trust not a corporation, the owners of whose stock or evidences of indebtedness may be liable to an assessment except for taxes.

Section 66 does not prohibit a domestic life company from investing three-quarters of its reserve in equipment trust notes which comply with paragraph 6 of section 63, nor does it forbid investment of one-quarter of the reserve in an unincorporated business or its securities, provided that such investment be secured by collateral.

9. — Single Premium Deferred Annuity Policy — Cash Value 435

The cash value of "a single premium deferred annuity policy," called a "deferred income bond," to be paid at the death of the insured, is to be computed under the provisions of G. L., c. 175, §§ 132 and 142.

10. — Furnishing of Bail Bonds by Surety Company — Sale of Powers of Attorney-in-fact for the Execution of Bail Bonds 473

A power of attorney-in-fact to execute a bail bond upon behalf of a surety company for the benefit of the holder of the power is not itself a contract of insurance or suretyship, but its exercise will result in the formation of a contract of suretyship. The seller of such a power must be a licensed resident agent of the surety company who issues it, under G. L., c. 175, § 157.

A bond executed by the holder of the power requires the seal of the surety company.

The propriety of the acceptance of a bail bond so executed by the holder of the power, for his own benefit, is a subject for judicial determination.

11. — Foreign Life Insurance Company — Participation in Surplus — Annual Dividends — Additional Option — Accelerative Endowment Plan — Commissioner of Insurance 480

A participating policy of a foreign life insurance company containing the four options for distributing annual dividends, as provided for in G. L., c. 175, § 140, may also contain a fifth option, called the accelerative endowment plan.

The enumeration of four options in G. L., c. 175, § 140, does not, as matter of law, exclude the insertion of additional options in a

INSURANCE — Continued.

life endowment or annuity policy relative to the application of the annual dividend.

It is for the Commissioner of Insurance to determine whether the provisions relative to annual participation in the surplus of the company are "more favorable to the insured or his beneficiary" than those defined by the statute.

12. — Broker — Advance Payment of Premiums for Customers . . . 487

The extension of credit to customers by a broker for the amount of premium payments advanced by him is not a violation of G. L., c. 175, §§ 182-184.

13. — Contracts of Guaranty — Security Guaranty Insurance — Credit Insurance — Title Insurance . . . 532

The business of security guarantee insurance is not a form of the insurance business authorized by G. L., c. 175.

14. — Statutory Construction — Reinsurance . . . 562

The words "one half of an individual risk," as used in G. L., c. 175, § 20, with relation to the maximum amount of permitted reinsurance, mean one half of the face amount of the policy.

15. — Contract of Insurance — Bond for Hospital Expenses . . . 567

An undertaking by an insurance company to pay hospital expenses incurred in a specified way, in consideration of a premium, is not a contract of suretyship but a contract of insurance.

16. — Contracts made in a Foreign State . . . 668

The provisions of G. L., c. 175, §§ 99, 152 and 157, as amended, are not applicable to foreign insurance companies with relation to contracts made by them in another State in conformity to the laws of the foreign jurisdiction.

17. — Admission of Foreign Life Insurance Companies — Net Value of Policies . . . 679

Outstanding loans to policy holders may not be deducted from the amount of the liability of a life insurance company upon its contracts, in determining the net value of all its policies, under G. L., c. 175, § 153.

18. — Form of Policy — Incontestability . . . 688

The form of an intermediate policy which is to supersede an industrial policy upon conversion by the insured does not conform to the requirements of the statutes if it contains terms relative to incontestability which do not conform to the provisions of G. L., c. 175, § 132, as amended.

19. — Contracts of Pure Endowment . . . 716

A corporation which issues a contract of pure endowment is to be considered a life insurance company, under G. L., c. 175, § 118.

INSURANCE — Continued.

If such a corporation is a foreign one and is not incorporated under the laws of its home State for the transaction of life insurance, it may not be admitted to do business in this Commonwealth, under G. L., c. 175, § 153.

20. — Contracts of Insurance — Service Contracts . . . 552
See AUTOMOBILE SERVICE.

- INSURANCE BROKER** — Brokers' License Fees — Partnership and Corporation Licenses — Veteran's Exemption . . . 648

The amount of the fee charged for an insurance broker's license to a partnership or corporation is not to be diminished because a partner or an officer is a veteran.

- INTEREST** — Grade Crossing — Refund 319
See GRADE CROSSINGS.

2. — State Retirement Association . . . 693
See STATE RETIREMENT ASSOCIATION. 5.

3. — Taxes — Computation of Time — Sunday . . . 721
See TAXES.

- INTOXICATING LIQUORS** — Constitutional Law — Federal Permit 123

An act providing that no person shall manufacture, transport, import or export intoxicating liquors or certain non-intoxicating beverages unless he shall have obtained the Federal permit required therefor by the laws of the United States, is constitutional.

2. — Forfeiture of Club Charter — "Conviction" . . . 361
See CLUB CHARTER.

- INVESTMENTS** — Savings Department of Trust Companies . . . 200
See SAVINGS BANKS. 1.

2. — Investment of Funds of Domestic Life Companies — Securities of Equipment Trusts . . . 431
See INSURANCE. 8.

- JURISDICTION** — Application of State Penal Statutes . . . 230

When the United States acquires lands within the limits of Massachusetts, with the consent of the Legislature of this Commonwealth, for the erection of a hospital, the Federal Constitution confers upon the United States the exclusive jurisdiction of the tract so acquired, and therefore penal statutes of this Commonwealth concerning the installation and use of compressed air tanks cannot constitutionally apply to contractors while engaged in work within the limits of a place under the exclusive jurisdiction of the Federal government.

JUSTICE OF THE PEACE — Notary Public — Residence in Massachusetts . . . 107

A person is ineligible for appointment as a justice of the peace or a notary public for Massachusetts unless he is a legal resident of Massachusetts.

2. — Notary Public — Tenure of Office — Removal from the Commonwealth . . . 126

During the period for which a person is commissioned a justice of the peace or a notary public he is authorized, while in this Commonwealth, to act as such unless and until he has been removed by action of the Governor and Council, as provided by the Constitution, although he cannot act as such when outside the jurisdiction of the Commonwealth.

A removal from the jurisdiction does not *ipso facto* terminate the tenure of office of a public official.

3. — Notaries Public — Appointment — Removal . . . 580
See NOTARIES PUBLIC. 1.

4. — Notaries Public — Powers and Duties . . . 585
See NOTARIES PUBLIC. 2.

5. — Notaries Public — Acting as Attorneys — Disqualification by Interest . . . 738
See NOTARIES PUBLIC. 5.

LAND ACQUIRED FOR PUBLIC USE — Disposition of — Public Charity — Impairment of Obligation of Contract — *Cy Pres* — Sale of Obsolete Property — Payment of Moneys received into State Treasury . . . 129
See CONSTITUTIONAL LAW. 13.

LANDLORD AND TENANT — Lease by Parol — Lessor — Contract to furnish Water, Heat, Light, etc. 538
St. 1920, c. 555, § 1, imposing a penalty upon any "lessor" who wilfully fails to perform an obligation to furnish water, heat, light, etc., applies to tenancies created by parol as well as by writing.

LAUNDRIES — Hours of Employment — Women and Children — Private Boarding Houses and Hospitals — Engineers — State Hospitals . . . 145
See HOURS OF LABOR. 1.

LAUNDRY INSURANCE — Insurance — Bond — Rebate . . . 426
See INSURANCE. 7.

LAYOUT — Cost — State Highways . . . 402
See HIGHWAYS.

LEASE — Sublease . . . 464
See FISH PIER.

LEASE — *Continued.*

2. — Lease by Parol — Lessor — Contract to furnish Water, Heat, Light, etc. . . 538
See LANDLORD AND TENANT.

LEASEHOLD — Deductions — Taxation — Domestic Business Corporation . . . 299
See TAXATION. 6.

LEGAL HOLIDAY — Hours of Labor — "Overtime Employment" . . . 681
See HOURS OF LABOR. 3.

LEGACY AND SUCCESSION TAX — Interests of Non-resident under Agreements with Massachusetts Corporations . . . 96

Under G. L., c. 65, § 2, property passing by virtue of the exercise by will of a power of appointment derived from a disposition of property before September 1, 1907, is subject to a succession tax as property passing by the will of the donee of the power.

A gift of property to one for life and on his death to his executor, to be paid over as the life beneficiary shall by will direct, gives him a general power to appoint by will.

A general power of appointment is well executed, unless a contrary intention is shown, by a general residuary clause in the will of the donee of the power.

The obligation of a Massachusetts corporation on the death of a non-resident to pay over a sum of money, with accumulated interest, to his executor, where no trust was intended to be created and no right in any specific property passed by the will of the deceased, is not an interest in property belonging to a person not an inhabitant of the Commonwealth which is taxable under G. L., c. 65, § 1, as amended by St. 1922, c. 403.

Where a Massachusetts trust company receives a fund in trust to invest the principal in a general trust fund, and, after the death of a life beneficiary, to pay the principal sum and accumulations of income to his executor, to be paid and distributed as he should by will direct, by transferring a proportional part of the general fund or the value thereof in money at the option of the company, and the fund is invested accordingly, on the death of the life beneficiary, being a non-resident and leaving a will by which the power of appointment is exercised, the proportional interest passing thereby in Massachusetts real estate and mortgages, stock of national banks situated in Massachusetts and stock of Massachusetts corporations, in which the general trust fund was partly invested, was taxable as property belonging to a person not an inhabitant of the Commonwealth, under G. L., c. 65, § 1, as amended by St. 1922, c. 403.

2. — Taxation . . . 386
See TAXATION. 7.

LEGISLATION — Constitutional Law —

Right of Petition — Fee for filing
Bill or Resolve . . . 632

The right to petition the Legislature for redress of grievances, under article XIX of the Declaration of Rights, does not extend to the initiating of legislation by the filing of a bill or resolve.

A reasonable fee may be imposed by the Legislature for the filing of a bill or resolve, in certain cases.

LEGISLATIVE POWER — DELEGATION OF —

Administrative
Officials — Unfair Discrimination
— Regulation of Dealers in Milk
and Cream . . . 169
See CONSTITUTIONAL LAW. 18.

LEGISLATIVE PRINTING — Clerks of the House and Senate . . . 517

All House and Senate bills and all documents intended for presentation to the General Court by any member or member-elect may be printed under the direction of the Clerks of the House and Senate, respectively.

The statutes and the rules of the General Court provide for the printing by the Clerks of certain other documents.

2. — Clerks of the House and Senate — Attorney General . . . 561

The statutes exclude legislative printing from the supervision and control of the Commission on Administration and Finance.

The power to contract for such printing, with certain exceptions, is lodged with the Clerks of the House and Senate.

In the absence of fraud or collusion, the jurisdiction of the Attorney General is limited to passing upon the legal form of the contract.

LETTERS OF CREDIT — Travelers'

Checks . . . 317
See SAVINGS BANKS. 2.

LICENSE — Hawkers and Pedlers —

Agents . . . 311
See HAWKERS AND PEDLERS. 1.

2. — Structures in Great Ponds . . . 316
See GREAT PONDS. 2.**3. — Plumbers — Apprentice — Journeyman — Probationary License 397**
See PLUMBERS. 2.**4. — Constitutional Law — Undertakers — Registered Embalmers . 400**
See UNDERTAKERS.**5. — Hawkers and Pedlers — Alien . 417**
See HAWKERS AND PEDLERS. 2.**6. — Registrar of Motor Vehicles — Revocation of License — New License — Appeal to Division of Highways — "Conviction" . 513**
See REGISTRAR OF MOTOR VEHICLES. 2.**LICENSE — Continued.****7. — Revocation of Registration or License — "Improper Person" . 661**
See REGISTRAR OF MOTOR VEHICLES. 3.**8. — Duplicate Licenses — Clerks of Towns . 672**
See DUPLICATE LICENSES.**9. — Public Warehousemen — Revocation of License on Discontinuance of Business . 659**
See WAREHOUSEMEN.**LICENSE FEE — Broker's License — War Service — Induction from a Draft Board — Discharge . 254**

An applicant for an insurance broker's license under G. L., c. 175, § 166, is not exempt from paying the fee prescribed by said section, on the ground that he has "served" in the Army of the United States, if he was inducted from a draft board, but was discharged before being mustered into the Federal service.

An "induction" from the draft is not the equivalent of "service" in the Army.

To have "served" in the Army a person must not only have been inducted from the jurisdiction of a draft board, but must also have been through the further process of being "mustered into" or enrolled in the service.

A "discharge from the draft" is not intended to be the equivalent of an honorable discharge for those who have actually been mustered into the service of the United States.

2. — Broker's License — Veteran — Service in the Army or Navy "in Time of War or Insurrection" — Punitive Expedition into Mexico . 172
See INSURANCE. 2.**3. — Exemption of Veteran Organizations from License Fees . 596**
See CONSTITUTIONAL LAW. 26.**LIFE INSURANCE — Foreign Life Insurance Company — Participation in Surplus — Annual Dividends — Additional Option — Accelerative Endowment Plan — Commissioner of Insurance . 480**
See INSURANCE. 11.**LISTING BOARD OF THE CITY OF BOSTON — City Department . 38**

The listing board of the city of Boston is not a city department, and is not subject to the ordinances of that city relative to printing and office supplies.

MARKETING CONTRACTS — Co-operative Agricultural Associations — Arbitrary Discrimination — Class Legislation . 139
See CONSTITUTIONAL LAW. 15.

MARRIAGE LICENSES — Town Clerks 728

Certificates may be issued upon filing of notices of intention although the parties are already legally married.

Where the validity of a previous marriage is doubted, town clerks must receive notices of intention and issue certificates thereon.

Town clerks have no discretion in regard to receiving notices of intention of marriage.

MARRIAGES — Authority to solemnize

— Officers of The Salvation Army

— "Ministers of the Gospel" —

"Denomination" — "Ordained" 150

The phrase "minister of the gospel," in G. L., c. 207, § 38, signifies one who expounds a system of belief based, at least primarily, upon the teachings of Christ.

The word "denomination," in G. L., c. 207, § 38, may be defined as a religious sect united upon a common creed or system of faith, which, if it holds that creed in common with other sects, is further distinguished from these by its belief in matters of polity or discipline.

An ordained minister, in the sense in which the word "ordained" is employed in G. L., c. 207, § 38, is one who has been set apart as a public teacher of religion according to the forms of the particular sect to which he belongs.

An officer of The Salvation Army is not "a minister of the gospel, ordained according to the usage of his denomination," within G. L., c. 207, § 38, and is not authorized to solemnize a marriage within the Commonwealth.

MASSACHUSETTS TRAINING

SCHOOLS — Return of a Ward 373

The trustees of the Massachusetts Training Schools have power to secure the return of a ward who has escaped or who has violated the terms of his parole. This power is not impaired by the fact that the ward is out on bail upon another offence.

MEDICAL CERTIFICATES — Insane

Persons — Requirements for Commitment . . . 626

See **INSANE PERSONS**.

MEDICAL EXAMINATION OF PRISONERS — Travel . . . 749

A physician who examines five prisoners, and who traveled only once to the jail for that purpose, is entitled to twenty cents per mile in only one of the cases.

The statute authorizes payments only for each mile actually traveled one way.

MENTAL DISEASES — Department of

— Records of Psychiatric Examinations . . . 605

See **PUBLIC RECORDS**. 3.

METROPOLITAN DISTRICT COM-

MISSION — Jurisdiction — Pri-

— Private Ways adjoining Roads con-

— Rights of Owners of Abutting

— Land to Egress and Ingress —

— Regulation . . . 259

METROPOLITAN DISTRICT COM-

MISSION — *Continued.*

The Metropolitan District Commission has the power, as to roads laid out under G. L., c. 92, § 33, to prohibit the construction of private ways connecting with such roads by abutting owners.

The Commission has not the right to prohibit the construction of a private way reasonably necessary for access to the land of an abutting owner connecting with a boulevard or roadway laid out under the provisions of G. L., c. 92, § 35.

If the owner of an abutting piece of land has been given by the Commonwealth, by deed, the right of free access to a "reservation" roadway or to a "boulevard," this right of free access cannot be limited by the Commission.

The Commission may make reasonable rules and regulations regulating the location of a private way which is to connect abutting land with a "reservation" roadway or "boulevard."

An abutting owner having a right of free access to a public way, not limited by the terms of a deed, is entitled to a connecting way for all purposes for which he may lawfully use his land.

A regulation restricting the use of such a private way, so as to interfere with any purpose for which the land of the abutting owner might lawfully be used, is not a reasonable regulation.

2. — Land bordering on Mystic Lakes — Easement . . . 278

By a continuous uninterrupted user an easement by prescription has been acquired in land bordering on the Mystic Lakes for the maintenance of a structure used as a boat club, and a right of way thereto.

3. — Repair of Bridge — Care and Control — Harvard Bridge . . . 471

Under St. 1924, c. 442, providing for the repair of the Harvard Bridge, the Metropolitan District Commission was constituted a public agency for the specific purpose of repairing the bridge, and the bridge was placed under the care and control of the Commission from and after the time of the completion of the work.

While the work of repairing said bridge is proceeding, the board of commissioners appointed under St. 1898, c. 467, and not the Commission, is responsible for the policing, control and maintenance of portions of the bridge kept open for public travel, and the cities of Boston and Cambridge, and not the Commonwealth, are liable under that statute for damages to persons traveling on the bridge, arising out of any defect or want of repair.

4. — Town of Clinton — Cost of Water — Pipe Line Rental . . . 671

See **CLINTON, TOWN OF**.

METROPOLITAN POLICE — Expenses as Witness — Reimbursement . . . 399

A metropolitan police officer who attends as a witness in a criminal case at a place other than his residence, and whose attendance is

METROPOLITAN POLICE — *Continued.*

not in the performance of the duties for which he is paid a salary, is entitled to a witness fee.

In all other cases, with certain minor exceptions, the expenses of such officer, necessarily and actually disbursed by him for testifying in a criminal case in the Superior Court, should be paid by the county. If the case is tried in a district court or before a trial justice, such expenses should be paid by the town where the crime was committed.

2. — Civil Service — Promotion . . . 509

The power temporarily to assign officers of the police force to duties of a higher rank is necessarily included in the power of the Metropolitan District Commission to organize its police force.

A temporary assignment of such officer to duties commonly pertaining to an office of a higher grade does not constitute a promotion, within the purview of the civil service laws.

MILITARY SUPPLIES — Military Purposes . . . 5

"Military supplies" are such supplies as are used for the maintenance of the militia in suitable efficiency.

The term "military purposes" comprehends all such uses as may be said to be incidental to the general purpose to conserve the military needs of the regimental organization.

MILK — Certified Milk — Foreign Supervision — Medical Milk Commissions . . . 284

Certification of milk by a foreign corporation or board is not a sufficient compliance with the requirements of G. L., c. 180, §§ 20-25, as amended.

MILK DEALERS — Registration — Constitutional Law — Police Power . . . 164
See CONSTITUTIONAL LAW. 17.2. — Regulation of — Constitutional Law — Delegation of Legislative Powers to Administrative Officials — Unfair Discrimination . . . 169
See CONSTITUTIONAL LAW. 18.**MINIMUM AND MAXIMUM SENTENCES** — Parole . . . 192
See PRISONERS. 1.**MINOR** — Firearms — Rifle Clubs . . . 161
See FIREARMS. 1.2. — Labor — Regulation of Employment . . . 422
See HOURS OF LABOR. 2.3. — Change of Domicil of Minor Child . . . 466
*See DOMICIL.***MORTUARY FUND** — Fraternal Benefit Society — Interest on Certain Loans . . . 240
See INSURANCE. 4.**MOTOR VEHICLES** — "Subsequent Conviction" . . . 651

A defendant cannot be held to have been "subsequently convicted" unless the offence which is the basis of the later conviction was committed after the offence for which he was previously convicted.

A person who violates several provisions of G. L., c. 90, § 24, as amended, all arising out of substantially the same act, cannot be held to have been subsequently convicted of any of the violations, even though the convictions occur at different times.

2. — License to operate — "Final Conviction" . . . 682

The term "final conviction" does not apply to the judgment and sentence of a district court when the defendant has filed an appeal therefrom.

3. — Operation — Jurisdiction over Non-residents . . . 88
See CONSTITUTIONAL LAW. 9.4. — Tax on Motor Vehicles . . . 91
See TAXATION. 3.**MUNICIPAL CORPORATION** — Constitutional Law — Water furnished without Charge to a Private Concern . . . 641

A bill providing that the city of Brockton may furnish, without charge, to the Sprague Neighborhood Center, a private corporation, a quantity of city water, to be used in a swimming pool, would, if enacted, be unconstitutional, as an expenditure of public money for an undertaking which is not exclusively under public control, under the provisions of Mass. Const. Amend. XLVI, § 2.

MYSTIC LAKES — Land bordering on Mystic Lakes — Easement . . . 278
See METROPOLITAN DISTRICT COMMISSION. 2.**NARCOTIC DRUGS** — Pharmacist — Prescriptions — Copies — Evidence . . . 33

Under G. L., c. 94, § 198, a prescription for narcotic drugs, when filled, must be retained on file for at least two years by the druggist filling it, and no copy of such prescription shall be made except for the purpose of record by said druggist.

It follows that a druggist cannot be summoned to appear before a court and ordered to bring with him the original prescription for narcotic drugs; but since the prescription and the druggist's record are required by statute to be open at all times to inspection by the officers of the Department of Public Health, the Board of Registration in Pharmacy, the Board of Registration in Medicine, authorized agents of said department and boards, and by the police authorities and police officers of towns and cities, the statements and items contained therein may be shown by the testimony of any observer thereof.

NATIONAL BANKS — Taxation of National Banks and Other Moneyed Capital . . . 540
See CONSTITUTIONAL LAW. 25.

2. — **Constitutional Law** — Taxation . 654
See TAXATION. 11.

NATIONAL GUARD — Practising Rifle or Pistol Shooting on Rifle Ranges on Sundays . . . 210
 The discharge of firearms on Sunday for sport or in the pursuit of game is prohibited.

Members of the National Guard may legally practise rifle or pistol shooting on a rifle or pistol range on Sundays, in the course of their military training.

NECESSARIES OF LIFE — Gasoline — Construction of Statute — Special Commission on the Necessaries of Life . . . 244
See GASOLINE. 1.

"NET INCOME" — Taxation of Corporations — Interpretation of Statute . . . 86
 Under the Federal Revenue Act of 1921, "net losses," as defined by section 204 are not deductible from "gross income" under sections 233 and 234, but are deductible from "net income" as defined by section 232.

"Net income," as defined by G. L., c. 63, § 30, par. 5, as amended by St. 1922, c. 302, means, with the modifications there specified, the net income required to be returned to the Federal government before the deduction of any sum as an allowance for net losses, and such losses are therefore not deductible under the corporation tax laws.

NOMINATION EXPENSES — Statements of Political Expenses — Filing . . . 530
See POLITICAL EXPENSES.

NORMAL SCHOOLS — Pecuniary Interest in School Books — Principal of State Normal School . . . 495
See EDUCATION. 1.

NOTARIES PUBLIC — Justices of the Peace — Appointment — Removal . . . 580
 Notaries public and justices of the peace are appointed and may be removed by the Governor, with the consent of the Council.

Apart from any legal limitations upon eligibility, all matters pertaining to the appointment and removal of notaries and justices, as, for example, the number of commissions to be issued, the personal qualifications required for appointment, or the grounds for removal, are entrusted to the discretion of the Governor and Council.

2. — **Justices of the Peace** — Powers and Duties . . . 585
 The powers and duties of notaries public and justices of the peace are collected and summarized.

NOTARIES PUBLIC — *Continued.*

3. — **Citizenship by Marriage** . . . 692
 An applicant for appointment to the office of notary public, born in Ireland, is an American citizen if his father was dead when his mother married a citizen of the United States during his minority and he became a permanent resident of the United States, provided his mother did not again change her citizenship during his minority.

Prior to 1922, an alien woman who married an American citizen became an American citizen herself, and the naturalization of the parent carried with it the naturalization of minor children dwelling in the United States.

4. — **Women** — Re-registration — Mass. Const. Amend. LXIX . . . 694
 Women notaries public are required to re-register when their names are changed. Until the Legislature has established a fee for such re-registration none can be required.

5. — **Justices of the Peace** — Acting as Attorneys — Disqualification by Interest . . . 738
 Notaries public and justices of the peace, not having been admitted to practice as attorneys, may not presume to act as such under cloak of their commissions.

A personal interest in the subject-matter of a transaction, sufficiently direct, may disqualify such officer from acting officially in connection therewith.

An interest of such officer's employer is not sufficient to work such disqualification.

6. — **Residence in Massachusetts** . . . 107
See JUSTICE OF THE PEACE. 1.

7. — **Tenure of Office** — Removal from the Commonwealth . . . 126
See JUSTICE OF THE PEACE. 2.

NURSERIES — Plant Pest Control — Abatement of Nuisance . . . 358
See PLANT PEST CONTROL.

OLEOMARGARINE — Department — Search Warrant . . . 182
See AGRICULTURE. 1.

OPINION — Expression — Ratification of Proposed Amendment to the Federal Constitution — Submission to the People for an Expression of Opinion . . . 445
See CONSTITUTIONAL LAW. 24.

OPINIONS OF THE JUSTICES — Constitutional Law . . . 594

The Governor and Council are authorized by the Constitution to require the opinions of the justices of the Supreme Judicial Court only upon matters then pending before the Governor and Council and in relation to the performance of their official duties.

OPTOMETRY — Registered Optometrist — Students — Examination 665

The term "registered optometrist," as used in G. L., c. 112, § 68, applies only to optometrists registered in Massachusetts.

Under G. L., c. 112, § 67, the Board of Registration in Optometry may properly rule that only those students studying under an optometrist duly registered in Massachusetts are entitled to receive the student certificate of fact referred to in section 68, and to be examined as provided in said section.

PAROLE — Prisoners — Minimum and Maximum Sentences . . . 192
See PRISONERS. 1.2. — Prisoners — Hearings . . . 199
See PRISONERS. 2.**PATIENTS IN INSTITUTIONS** — State Hospital — Temporary Release on Visit — Authority of Superintendent . . . 602
*See STATE HOSPITAL.***PEDDLING PATENT MEDICINES** — Retail Drug Store — Registration and Permit . . . 462
See DRUG STORE. 1.**PENSION** — State Retirement System — Salary or Wages . . . 437
See STATE RETIREMENT ASSOCIATION. 2.**PHARMACIST** — Narcotic Drugs — Prescriptions — Copies — Evidence . . . 33
See NARCOTIC DRUGS. 1.**PHARMACY, BOARD OF** — Agent — Powers — Inspection of Drug Stores — Right to use Force — Taking of Samples . . . 394

The inspection of drug stores, which an agent of the Board of Registration in Pharmacy may make, must be reasonable, with a view to accomplishing the purpose of the statute.

Opening closets, pulling out drawers and examining the contents of cans, jugs and other containers is a reasonable mode of inspection.

Such agent may probably not use force to gain entry to a drug store for the purpose of making an inspection.

If peaceable entry is obtained, an inspection may probably be made against the owner's will.

Right to take samples is not incidental to or part of the right to inspect.

The agent of the Board of Registration in Pharmacy may not take samples without the consent of the person in charge of the store.

2. — Records — Public Inspection . . . 8
See PUBLIC RECORDS. 1.**PILOTS** — Suspension — Revocation of Commission — "Active Service" 389

Under the statutes, a commissioner of pilots may suspend a pilot whom he finds to be guilty of misconduct, carelessness or neglect of duty, and he may revoke the pilot's commission only with the concurrence of the trustees of the Boston Marine Society.

Under the rules and regulations for pilotage for the Fourth Pilot District a pilot holding a commission for service there may not be suspended except for misconduct, carelessness or neglect of duty.

Such a pilot, if not under suspension or leave of absence, is in active service, and should be assigned to pilotage duty.

PIPE LINE RENTAL — Metropolitan District Commission — Town of Clinton — Cost of Water — Pipe Line Rental . . . 671
*See CLINTON, TOWN OF.***PLANT PEST CONTROL** — Nurseries — Abatement of Nuisance . . . 358

The director of the Division of Plant Pest Control has no authority to abate a nuisance caused by the presence of gypsy or brown tail moths in land separated from a nursery by a public highway, but has such authority when the nuisance is caused by the presence of other serious insect pests.

PLAYGROUNDS — Constitutional Law — "Anti-aid" Amendment — Lease of Park Lands by City . . . 62

Legislation designed or framed to accomplish the ultimate object of placing property in the hands of one or more private persons after it has been taken by the superior power of the government from another private person, avowedly for a public purpose, is unconstitutional.

The Legislature may authorize the sale or lease of land held for a public purpose when the public purpose designed has been completely accomplished, or when through lapse of time or changed conditions continued ownership of the land by the public agency is no longer necessary or needed.

Land of a city or town held strictly for public uses as a park, and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court, which may transfer it to some other agency of government or devote it to some other public use.

Whether a statute appropriates property to a public use or to a private use is a judicial question, upon which the constitutionality of the act depends.

The advisability, necessity or expediency of passing legislation is a matter solely for the determination of the Legislature.

PLUMBERS — Master Plumbers — Registration — Non-resident — Building Department of the City of Boston . . . 238

PLUMBERS — Continued.

A master plumber who has a regular place of business and performs plumbing work by himself or by his journeymen may lawfully be registered under the provisions of existing statutes, even if he is not a resident of the state.

2. — Apprentice — Journeyman — Probationary License . . . 397

A person learning the business of plumbing may not lawfully be sent out to do the work of a journeyman plumber unless he is registered or has been licensed as required by G. L., c. 142, § 3, except that a person who has worked for instruction, for not less than three years, and has complied with the requirements of G. L., c. 142, § 4, may have issued to him a probationary license under which he may be sent out to do the work of a journeyman.

POLICE COMMISSIONER — Civil Service — Non-competitive Examinations . . . 228

The Commissioner of Civil Service alone has the power to determine whether examinations for promotion in the police force of Boston are to be by competitive or non-competitive examinations.

2. — Powers — Rules and Regulations — Hackney Carriage Stands . . . 674

The Police Commissioner for the City of Boston may grant hackney carriage stands in public streets against the protest of abutting owners or lessees, but such use of public streets must not infringe the right of abutting owners to have reasonable access to their premises.

An abutting owner or lessee cannot lawfully demand that hackney carriage stands be granted to specified persons, but he may provide cabs for the reasonable accommodation of guests or customers, subject to the right of the public to the full enjoyment of the public easement.

3. — Powers — Removal of Police Officer . . . 695

The removal of a police officer in the city of Boston is subject to the requirements of G. L., c. 31, § 44, whereby he is entitled to a public hearing.

The trial board established by St. 1906, c. 291, § 10, is a merely advisory board whose function is to report its findings to the Commissioner for final disposition.

4. — Attorney General — Duty to advise — Regulations forbidding Political Activities . . . 735
See ATTORNEY GENERAL. 3.

POLICE OFFICER — Expenses of serving Warrant — Payment . . . 531

The expenses of a police officer, necessarily incurred in the service of a warrant or capias in a criminal case tried in a district court, should be paid by the clerk of the district court.

POLICE OFFICER — Continued.

2. — Police Commissioner for the City of Boston — Powers — Removal 695
See POLICE COMMISSIONER. 3.

3. — Political Activities — Duty to advise the Police Commissioner . . . 735
See ATTORNEY GENERAL. 3.

POLICE POWER — Constitutional Law — Impairment of Contract — Eminent Domain — Boston Elevated Railway Company — Eastern Massachusetts Street Railway Company . . . 11

The power to take property by eminent domain and the police power are sovereign powers which cannot be granted away by contract with the State.

Certain bills, if enacted, would be unconstitutional, for reasons stated in previous opinions.

A bill providing for the construction of a tunnel in Boston and a lease thereof to the Boston Elevated Railway Company, with a proviso that if the company does not consent thereto its elevated structures shall be removed without compensation, would, if enacted, be unconstitutional as an impairment of the contract contained in Spec. St. 1918, c. 159, and an arbitrary confiscation of the company's property.

A bill providing for an amendment of Spec. St. 1918, c. 159, to take effect on its acceptance by the Boston Elevated Railway Company, if enacted, would be constitutional, under circumstances stated in the opinion.

Bills providing for the taking by eminent domain of property of the Eastern Massachusetts Street Railway Company and leasing the same to the Boston Elevated Railway Company would be constitutional, if enacted.

POLITICAL COMMITTEE — Membership — Police Power . . . 350
See CONSTITUTIONAL LAW. 22.

POLITICAL EXPENSES — Statements of — Filing . . . 530

Statements of political expenses required by G. L., c. 55, §§ 16 and 17, should not be accepted for filing prior to the last day for filing nominations, in the case of nomination expenses, nor prior to the election, in the case of election expenses.

PONDS — Fish and Game — Artificial Ponds . . . 608
See FISH AND GAME.

POWER OF APPOINTMENT — Interests of non-residents — Taxation 96
See LEGACY AND SUCCESSION TAX.

2. — Income Tax — Gain received by Appointee under General Power 496
See TAXATION. 8.

PREMIUMS — Advance Payment of
Premiums for Customers . . . 487
See INSURANCE. 12.

PRESCRIPTIVE RIGHTS — Great
Ponds — Title — Control —
Public Rights — Access — Fish-
ing — Colonial Ordinance of
1641-1647 . . . 262
See GREAT PONDS. 1.

PRIMARIES — Candidates for Delegates
to National Party Conventions
— Preferences . . . 376
See ELECTIONS. 2.

2. — Candidates for County Commis-
sioner . . . 519
See ELECTIONS. 3.

**PRINTING FOR MILITARY PUR-
POSES** . . . 687
Printing for military purposes must be done
under the supervision of the Division of Per-
sonnel and Standardization.
See also LEGISLATIVE PRINTING.

PRISONERS — Minimum and Maximum
Sentences — Parole . . . 192
A sentence for a minimum and maximum
term is in effect a sentence for the maximum
term.

A prisoner in the Reformatory for Women,
under a sentence of not less than five years and
not more than eight years, is eligible for parole
after serving three years and eleven months.

2. — Application for Parole — Hearings 199
A prisoner alone may apply for a permit to
be at liberty.

Whether the Board of Parole will hear per-
sons other than the prisoner, in his behalf, is
a matter within its own discretion.

3. — State Prison — Successive Sen-
tences . . . 285

A second sentence of a person serving a sen-
tence at the State Prison begins to run upon
the expiration of the minimum term of the
first sentence.

The first sentence of such prisoner is not
terminated by the taking effect of the second
sentence.

After the second sentence of such prisoner
takes effect, both sentences run concurrently.

PRIVATE RESIDENCE — Elevators —
Inspection of . . . 492
See ELEVATORS.

PRIVATE WAYS — Rights of Owners of
Abutting Land to Egress and
Ingress — Regulation . . . 259
*See METROPOLITAN DISTRICT
COMMISSION.* 1.

PROBATION OFFICERS — Retirement 521
The classes of probation officers entitled or
required to be retired under G. L., c. 32, §§ 75
and 76, defined.

The classes of probation officers who must
be retired upon reaching the age of seventy
years defined.

PROBATIONARY PERIOD — Civil
Service — Promotion . . . 37

The rule providing that no person "shall be
regarded as holding office or employment in
the classified public service until he has served
a probationary period of six months," does not
apply in the case of promotion from one grade
of the classified civil service to the next grade.

PROMOTION — Metropolitan Police —
Civil Service . . . 509
See METROPOLITAN POLICE. 2.

PUBLIC CHARITY — Taxation — Ex-
emption — Theatre . . . 572
See TAXATION. 10.

PUBLIC HEALTH — Licenses — Cold
Storage Warehouse . . . 190

G. L., c. 94, § 66, providing that "no person
shall maintain a cold storage or refrigerating
warehouse without a license issued by the de-
partment of public health," requires a separate
license for each plant operated.

Whether a group of buildings may fairly be
considered to constitute but a single plant, and
therefore to require but a single license, is a
question of fact to be decided upon the con-
crete circumstances of each case.

2. — Regulations of United States Pub-
lic Health Service . . . 731

The Department of Public Health has no
authority to use its facilities in enforcing regu-
lations of the United States Public Health
Service.

PUBLIC LAND — Public Ownership —
Legislative Power to authorize a
Grant of Land by a City to the
Trustees of a College . . . 616
See CONSTITUTIONAL LAW. 27.

PUBLIC MONEY — Constitutional Law
— Reimbursement . . . 69

A proposed bill which authorizes the city of
Boston to discharge its obligation to reimburse
a certain company for losses sustained in cer-
tain coal deliveries is constitutional, inasmuch
as the reimbursement is not a gift of the public
money but is in the nature of compensation for
value received by the city.

PUBLIC OFFICE — Political Committee 350
See CONSTITUTIONAL LAW. 22.

PUBLIC POLICY — Submission to Vot-
ers of a Question of Public Policy
— Majority of All the Votes cast 583

G. L., c. 53, § 22, providing that no vote on
the submission of a question of public policy
shall be regarded as an instruction unless the
question submitted receives a majority of all
the votes cast at that election, means a ma-
jority of all the ballots cast, and not a majority
of the votes cast upon the question submitted

PUBLIC RECORDS — Records — Public Inspection 8

The only records open to public inspection are public records and those which some statute specifically provides shall be so open.

Public records are records required by law to be filed, or upon which the law requires an entry to be made.

2. — Certification of Copies — Secretary of the Commonwealth 324

Under G. L., c. 9, § 11, the precise form in which copies of public records shall be certified is within the discretion of the certifying officer, but the copies must be full, exact and literal: authentication by seal is impliedly authorized.

3. — Department of Mental Diseases — Records of Psychiatric Examinations 605

The Department of Mental Diseases is not required to furnish results of psychiatric examinations had under G. L., c. 127, §§ 16 and 17, as amended by St. 1924, c. 309, to any person other than the person designated therein.

4. — Criminal Cases 295 See REGISTRAR OF MOTOR VEHICLES. 1.

PUBLIC SCHOOLS — Department of Education — State Reimbursement — School Buildings and Equipment 463

The Department of Education is empowered to withhold State reimbursement due to a town under G. L., c. 70, pt. II, when such town neglects to furnish its school buildings with all or any of the forms of equipment required by law.

PUBLIC TRIAL — Constitutional Law 82 See CRIMINAL CASES.

PUBLIC WAY — Bridge over Highway — Ownership of Fee 183 See CONSTITUTIONAL LAW. 20

2. — Load weighing more than Fourteen Tons — Permit to travel on a Public Way — Maximum Load 599 See VEHICLE.

PUBLIC WORK — Contract with Two or More Corporations, acting jointly — Partnership 116 See CONTRACT. 1.

PUBLIC WORKS — Authority to sell Certain Land belonging to the Commonwealth 557

The Department of Public Works, as the successor of the Commission on Waterways and Public Lands, which succeeded the Board of Harbor and Land Commissioners, is not authorized to sell and convey land of the Commonwealth in the absence of specific authority from the Legislature.

QUARANTINE STATIONS — Animal Industry — Tuberculin — Disposition of Diseased Animals 456 See ANIMAL INDUSTRY.

RAILROAD TICKETS — Constitutional Law — Prohibition of Resale of Reduced Fare Railroad Tickets. 618

A statute forbidding the resale of railroad commutation tickets under certain circumstances would be constitutional.

RATES — Difference in — Policies to Tobacco Growers for Damage by Hail — Difference in Cost of Policies to Different Persons — Rebates 214 See INSURANCE. 3.

REBATES — Policies to Tobacco Growers for Damage by Hail — Difference in Cost of Policies 214 See INSURANCE. 3.

RECLAMATION DISTRICT — Land of the Commonwealth — Authority of Officials 559

Officials have no power to institute petitions for, nor to make the Commonwealth or municipalities parties in, a reclamation project, under G. L., c. 252, §§ 1 and 5, as amended.

2. — Assessment upon Land of the Commonwealth 720

Claim for a sum of money equal to an assessment upon a private proprietor may not be paid by an official on behalf of the Commonwealth under St. 1924, c. 395.

REGISTRAR OF MOTOR VEHICLES — Records in Certain Criminal Cases 295

It is the duty of courts and trial justices to send to the Registrar of Motor Vehicles abstracts of records of cases in which persons are charged with violations of the automobile laws, when such cases have been disposed of. Courts and trial justices are not bound to send to the Registrar of Motor Vehicles abstracts of cases which have been continued but not disposed of.

2. — Revocation of License — New License — Appeal to Division of Highways — "Conviction" 513

The power of the Registrar of Motor Vehicles to issue and revoke licenses to operate motor vehicles is statutory, and can be exercised only in accordance with the statute.

After the license of a person, convicted of operating a motor vehicle while under the influence of intoxicating liquor, has been revoked, the registrar has no power to issue a new license prior to the expiration of the time fixed by statute.

The power of the Division of Highways to entertain appeals from the registrar's decisions is confined to cases where the registrar may exercise his discretion.

REGISTRAR OF MOTOR VEHICLES*— Continued.*

No appeal lies from the refusal of the registrar to issue a new license after a revocation and prior to the expiration of the statutory period.

The placing of a case on file, upon the payment of costs, after a plea of "not guilty" does not constitute a "conviction."

Such action constitutes an "acquittal" within the purview of G. L., c. 90, § 24.

3. — Revocation of Registration or License — "Improper Person" . 661

The Registrar of Motor Vehicles may suspend or revoke any certificate or license issued under G. L., c. 90, for any cause which he deems sufficient.

He may not invoke this power in an arbitrary or unreasonable manner or in bad faith.

In determining whether a license or certificate should be suspended or revoked, the Registrar is not limited to a consideration of the violation of motor vehicle laws or of the right of the public to use public ways in safety.

4. — Approval of Increases in Salaries of Motor Vehicle Investigators . 272
See COMMISSIONER OF PUBLIC WORKS.

REGISTRARS OF VOTERS — Recount

— Clerical Assistance — Guard Rail 7
See ELECTIONS. 1.

REIMBURSEMENT — Constitutional

Law — Public Money . 69

A proposed bill which authorizes the city of Boston to discharge its obligation to reimburse a certain company for losses sustained in certain coal deliveries is constitutional, inasmuch as the reimbursement is not a gift of the public money but is in the nature of compensation for value received by the city.

2. — Department of Education — State Reimbursement — School Buildings and Equipment 463
See PUBLIC SCHOOLS.

REINSURANCE — Statutory Construction

. 562

See INSURANCE. 14.

REPRESENTATIVE — Eligibility of a

Member of the General Court to Other Employment by the Commonwealth — Salary 448
See GENERAL COURT.

RESTRICTIONS — Back Bay Lands —

Equitable Restrictions 510
See BACK BAY LANDS. 1.

2. — Back Bay Lands — Release . 750
See BACK BAY LANDS. 2.

RETIRED TEACHER — Reemployment

630
See TEACHERS' RETIREMENT ASSOCIATION. 4.

RETIREMENT — Probation Officers —

Retirement 521
See PROBATION OFFICERS.

RETROACTIVE STATUTE — Taxation

— Corporation Tax Law 732
See TAXATION. 12.

RIFLE CLUBS — Minors 161

See FIREARMS. 1.

RISERS — Packing Apples — Standard

Box for Farm Produce — Requirements as to marking Boxes 211

An apple grower who uses boxes which are standard according to St. 1921, c. 248, must mark said boxes, if they contain apples, in accordance with the requirements of both said chapter 248 and G. L., c. 94, § 104.

The dimensions of the standard box for farm produce sold at wholesale, as defined in St. 1921, c. 248, are not affected by the fact that in some instances, where such box is used for the packing of apples, risers, so called, about five-eighths of an inch thick, are placed on the ends of the box; if the box contains the dimensions required by statute it constitutes a standard box.

SALARY — State Retirement System . 437

See STATE RETIREMENT ASSOCIATION. 2.

2. — Eligibility of a Member of the General Court to Other Employment by the Commonwealth . 448
See GENERAL COURT.

SALE OF COMMONWEALTH LAND

— Authority to sell Certain Land belonging to the Commonwealth 557
See PUBLIC WORKS.

SALVATION ARMY — Marriages —

Authority to solemnize — "Ministers of the Gospel" — "Denomination" — "Ordained" . . . 150
See MARRIAGES.

SAVINGS BANKS — Savings Depart-

ments of Trust Companies — Authorized Investments — Construction of Indenture with Relation to Bond Issues 200

Certain railroad bonds, the authorized issue of which, by the terms of the indenture, can never exceed, with all outstanding debts, three times the value of the capital stock, are a legal investment for savings banks and savings departments of trust companies.

2. — Sale of Travelers' Checks and Letters of Credit 317
A travelers' check or letter of credit is not a transmission of money or the equivalent thereof within the meaning of G. L., c. 168, § 33A.

3. — Dividends 344
A savings bank is not required, even if its earnings are sufficient, to pay a regular dividend of five per cent.

SAVINGS BANKS — *Continued.*

4. — Investment in Municipal Bonds . 685
Bonds for municipal purposes, which are not direct obligations of the municipalities which purport to issue them, are not lawful investments for savings banks.

SCHOOL BOOKS — Pecuniary Interest in School Books — Principal of State Normal School . 495
See EDUCATION. 1.

SCHOOL BUILDINGS — Public Schools — Department of Education — State Reimbursement . 463
See PUBLIC SCHOOLS.

SCHOOLS — Transportation — Classification of Pupils entitled to Reduced Fare on Street Railways . 346

With the exception of pupils in private schools and colleges which furnish a more advanced form of education than the equivalent of a public high school course, and pupils of a single class conducted independently without reference to other groups or classes having a common management, pupils who attend the public schools or private schools whose curriculum is similarly limited and pupils of vocational schools subject to G. L., c. 74, are entitled to the special rate of fare on street or elevated railways provided by G. L., c. 161, § 108.

2. — Unvaccinated Child — Admission — Proof of Vaccination . 370
See VACCINATION.

3. — Union Superintendent — Salary — State Reimbursement . 683
See TOWNS.

SEARCH WARRANT — Oleomargarine 182
See AGRICULTURE. 1.

SECRETARY — Presidential Primaries — National Party Conventions — Preferences . 376
See ELECTIONS. 2.

SENTENCES — State Prison — Successive Sentences . 285
See PRISONERS. 3.

SETTLEMENT — Veteran — "Actually resided" . 341
See VETERAN. 3.

SEWAGE — Public Health — Aberjona River — Regulations — Sewage 289
See COMMISSIONER OF PUBLIC HEALTH. 1.

SMALL LOANS — Unlawful Charges — Waiver of Statutory Protection — Attempted Evasion of the Statute . 606

A borrower cannot by contract deprive himself of the right given by G. L., c. 140, § 90, to discharge the debt by tender of principal with interest at 18%.

SMALL LOANS — *Continued.*

G. L., c. 140, §§ 96-114, relating to loans of \$300 or less, cannot be evaded by paying \$301 to a borrower who desires to borrow less than \$300 with the understanding that he will at once pay back the excess.

SOLDIER — Broker's License — War Service . 254
See LICENSE FEE. 1.

2. — Insurance — Broker's License — Fee . 556
See BROKER'S LICENSE.

SOLDIERS' HOME — Constitutional Law — "Anti-aid" Amendment — Appropriation of Public Money for Private Purposes — Civilian Employees — Civil Service Rules and Regulations — State Retirement System . 73

The Soldiers' Home is a privately owned charitable corporation, not a State institution.

Employees of the Soldiers' Home are not employees of the Commonwealth, and are not within the scope of the State retirement system, provided for by G. L., c. 32, §§ 1-5.

Employees of the Soldiers' Home are not "in the service of the Commonwealth," within the meaning of G. L., c. 31, § 3, and are not subject to the civil service rules and regulations.

A statute extending the State retirement system so as to include all civilian employees of the Soldiers' Home would authorize the employment of public money for private purposes, and would be unconstitutional.

A statute extending the State retirement system so as to include the civilian employees of the Soldiers' Home is not an appropriation "for the maintenance and support of the Soldiers' Home in Massachusetts," authorized by Mass. Const. Amend. XLVI, § 2.

SOLDIERS' RELIEF — Dependents — Re-enlistment in Time of Peace — Veteran — Honorable Discharge — Effect of Dishonorable Discharge . 225

The dependents of a person who served honorably in the war with Spain or in the World War, if otherwise eligible to receive soldiers' relief under G. L., c. 115, § 17, are not deprived of the benefits conferred thereby merely because the soldier later enlisted when the country was not at war and is serving in a peacetime enlistment.

A veteran, otherwise eligible, is entitled to receive the benefits of State and military aid and soldiers' relief under the provisions of G. L., c. 115, where such veteran had an honorable discharge from his war service, although in an enlistment prior or subsequent to such war service he received a dishonorable discharge from the service, unless the dishonorable discharge be in itself the direct and proximate cause of the inability of the veteran wholly or partly to provide maintenance for himself and his dependents.

SOUTH ESSEX SEWERAGE BOARD

— Qualifying Oaths — Civil Service . . . 719

Members of the board who are entitled to places thereon as incumbents of other offices under the Commonwealth are not required to take a qualifying oath.

Employees of the board are not under civil service laws.

SPECIAL POLICE — Armories . . . 354
See ARMORERS.

STATE AID — Settlement . . . 341
See VETERAN. 3.

2. — Teachers . . . 593
See EDUCATION. 2.

STATE EMPLOYEE — Removal — Hearing — Veteran at State Infirmary — Civil Service . . . 90

The services of a State employee who is a veteran, but whose employment has not been approved by the board of trustees of the State Infirmary as required by G. L., c. 122, § 1, and who is not employed as the result of an appointment under civil service provisions, may legally be discontinued without hearing.

STATE FIRE MARSHAL — Gasoline — Powers — Appeal — "Person Aggrieved" — Revocation of Permits — Street Commissioners of Boston . . . 450

The use of land for the keeping, storage and sale of gasoline, in the absence of a restrictive statute, is lawful.

The powers of the State Fire Marshal, being purely statutory, can be exercised only in accordance with the statute.

If the State Fire Marshal delegates his power to grant licenses or permits, and the delegated officer acts thereunder, the Fire Marshal has no power to hear and determine the question except on appeal by a "person aggrieved."

A "person aggrieved" is one whose personal or property rights are or may be adversely affected in a special manner by the action of the licensing authority.

A person whose rights may be affected only in so far as he is a member of the general public, and only to the same extent as other members of the public, is not a "person aggrieved."

The State Fire Marshal may revoke any permit, but such revocation cannot be made arbitrarily.

The street commissioners of Boston have no authority to issue permits to store, handle or sell gasoline except as the State Fire Marshal delegates such authority to the board.

2. — Fire Prevention Commissioner for the Metropolitan District — Fire Commissioner of the City of Boston — Delegation of Power — Revocation of Authority . . . 710

The delegation of power by the Fire Prevention Commissioner for the Metropolitan

STATE FIRE MARSHAL — *Continued.*

District to the fire commissioner and his assistants of the city of Boston, under authority of St. 1914, c. 795, § 4, not having been revoked or modified, either by the Fire Prevention Commissioner or by the State Fire Marshal, who succeeded him under Gen. St. 1919, c. 350, whereby the powers of the Commissioner were transferred to the Department of Public Safety, is still in full force and effect.

3. — License to maintain Garage and keep Gasoline — License Commissioners of Cambridge — Right of Appeal . . . 293
See GASOLINE. 2.

STATE HOSPITAL — Temporary Release of Patient on Visit — Authority of Superintendent . . . 602

While a patient committed for observation under G. L., c. 123, § 77, as amended by St. 1924, c. 19, cannot be discharged by the superintendent of the institution unless he is found to be sane, nevertheless, such superintendent may grant a leave of absence to any patient, including those committed for observation, by virtue of and in compliance with the provisions of G. L., c. 123, § 88.

STATE HOUSE GROUNDS — Traffic and Parking Regulations — Authority of Superintendent of Buildings . . . 296

Pursuant to statutory authority, the title to the ways within the State House grounds has been acquired by the Commonwealth, and the streets formerly located therein have been discontinued.

Under G. L., c. 8, §§ 4, 9 and 12, and c. 85, § 23, the Superintendent of Buildings, with the approval of the Governor and Council, may make traffic and parking regulations applicable to ways within the State House grounds, and may enforce such regulations through watchmen appointed by him.

STATE OFFICERS — Employees — Witness Fee — Expert Witnesses — Compulsory Process . . . 326
See WITNESS FEES. 1.

STATE POLICE — Power under Volstead Act — Power conferred on State Officers by Congress . . . 506

State police officers, as such, have no authority or power to act under the National Prohibition Act.

The police, however, as private citizens may exercise such powers in apprehending violators of the Federal law as are shared by them in common with all other citizens.

While Congress may confer power upon State officers which the latter may, in their discretion, exercise, unless prohibited by State legislation, Congress cannot compel them to act.

STATE PRISON — Concurrent Sentences — Aggregate of the Minimum Terms . . . 504

The court, in imposing several sentences to the State Prison, may order that they be served concurrently.

The aggregate of the minimum terms of several concurrent sentences is the largest minimum term.

STATE RETIREMENT ASSOCIATION

— Workmen's Compensation —
Injured Employee — Retirement 307

Payments made in accordance with the requirements of the Workmen's Compensation Act are not to be construed by the Board of Retirement as salary or wages.

If a member of the Retirement Association above the age of seventy years applies for retirement because of age and service and not because of any disability, his retirement allowance should be figured from the date on which he should have automatically been removed from the service at the age of seventy years, in accordance with the statute G. L., c. 32, § 2, par. (4).

2. — Salary or Wages . . . 437

Extra compensation for special services out of office hours is not "salary," within the meaning of G. L., c. 30, § 21.

Under G. L., c. 32, § 1, as amended by St. 1922, c. 341, § 1, additional compensation for discontinuous employment out of office hours is not "salary or wages," and should not be considered in computing a pension payable under G. L., c. 32, § 5, par. (2) C (b).

3. — Membership — Age . . . 440

The State Board of Retirement would not be justified in retiring a person who purported to join the association after June 1, 1912, at the supposed age of fifty-three years but who, in fact, at that time had passed the age of fifty-five years, such person not being a member of the association, and accordingly not entitled to retirement.

4. — Pensions for Veterans — "Compensation" . . . 646

The word "compensation," as used in G. L., c. 32, § 57, providing for retirement of veterans from active service at one-half the regular rate of compensation, upon certain conditions, means compensation actually paid in cash, and does not include additional benefits received, such as boarding and housing.

St. 1922, c. 341, § 2, providing for the addition of \$5 per week, in certain instances, as a non-cash allowance in addition to salary, does not alter the meaning of the word "compensation" as used in G. L., c. 32, § 57.

5. — Interest . . . 693

Interest may not be allowed on money paid in by a member of the State Retirement Association for any period after the date of cessation of employment.

STATUTES — Construction of St. 1922, c. 462 — Directory or Mandatory . . . 287

A statute directing a public official to do a certain act within a certain time is generally construed as being directory rather than mandatory, and not as limiting his authority to do the act after the expiration of the time.

St. 1922, c. 462, directing the Division of Waterways and Public Lands to determine the location where it is advisable to build a public terminal for the Cape Cod Canal, and authorizing the Division thereafter to build such terminal, does not require the Division to determine the location within definite limits of time.

2. — Highways — Appropriation — Interpretation of Statute . . . 743

It is a canon of statutory construction that a general act passed after a special act relating to the same subject-matter is not to be construed as an implied repeal of the special act without clear indication that it was the intention of the Legislature that the latter should supersede the former.

St. 1925, c. 288, providing for the creation of the Highway Fund, was not intended to repeal Gen. St. 1915, c. 221, § 5, as amended, under which money repaid to the Commonwealth by the counties in which highways were to be constructed was required to be expended by the Division of Highways without further appropriation.

STOCKHOLDERS — Corporations —

Right to inspect Corporate Records . . . 79

A proposed bill is constitutional which provides that, if an action for damages or a proceeding in equity is commenced for neglect or refusal to exhibit for inspection the stock and transfer books of a corporation, "it shall be a defence that the actual purpose and reason for the inspection sought are to secure a list of stockholders for the purpose of selling said list, or copies thereof, or of using the same for a purpose other than in the interest of the applicant, as a stockholder, relative to the affairs of the corporation."

STRIKES — Sabotage — Insuring against loss . . . 356
See INSURANCE. 5.

SUNDAY — Practising Rifle or Pistol Shooting on Rifle Ranges on Sundays . . . 210
See NATIONAL GUARD.

SUPERVISORS OF EDUCATION — Teachers' Retirement Association — Membership . . . 554
See TEACHERS' RETIREMENT ASSOCIATION. 3.

TAX SALES — Constitutional Law — Nature of Title acquired . . . 644

An act which provides that a purchaser of certain lands at a tax sale shall acquire an "absolute" title does not render the act unconstitutional, as the determination of the validity of the title is still left open to review by the courts.

TAXATION — Trust Companies — Meaning of Words "Capital Stock" . . . 1

The words "the total amount of its capital stock," in G. L., c. 63, § 58, are intended to describe the amount of capital stock authorized, issued and paid in in cash.

So long as a trust company is not dissolved and is not prevented by the State itself from doing business, it is subject to the franchise tax imposed by G. L., c. 63, § 58.

2. — Interpretation of Statute — "Net Income" . . . 86

Under the Federal Revenue Act of 1921, "net losses," as defined by section 204, are not deductible from "gross income" under sections 233 and 234, but are deductible from "net income" as defined by section 232.

"Net income," as defined by G. L., c. 63, § 30, par. 5, as amended by St. 1922, c. 302, means, with the modifications there specified, the net income required to be returned to the Federal government before the deduction of any sum as an allowance for net losses, and such losses are therefore not deductible under the corporation tax laws.

3. — Tax on Motor Vehicles . . . 91

A statute purporting to impose an excise tax on motor vehicles, measuring the tax by a percentage of their list prices and exempting them from local property taxation, would be unconstitutional because the tax in its essence would be a tax upon the mere ownership of property, which would not be proportional.

4. — Exemption — Property of Grand Army of the Republic . . . 176

Under G. L., c. 59, § 5, cl. 5th, as amended by St. 1921, c. 474, and by St. 1922, c. 222, portions of a building belonging to a post of the Grand Army of the Republic, which are let to tenants, are not exempt from taxation, and should be separately valued and taxed.

5. — Foreign Corporations — Alloca- tion of Income . . . 216

Under Gen. St. 1919, c. 355, §§ 19 and 20 (G. L., c. 63, §§ 41 and 42), a foreign corporation must give notice in each year of its refusal to accept determination of income allocable to the Commonwealth by the statutory method provided by section 19, as a basis of its right to have its net income derived from business carried on within the Commonwealth determined by the alternative method provided by section 20.

TAXATION — Continued.

6. — Domestic Business Corporation — Deduction on Account of Lease- hold Interest . . . 299

The purpose of the deductions in the corporation tax law is to avoid double taxation.

Leaseholds are not real estate subject to local taxation, and therefore are not deductible, under G. L., c. 63, § 30, par. 3, (a) and (c), whether the property is within or outside the Commonwealth.

Since buildings on land are taxable with the land as real estate, although by agreement, as against the owner, they may be considered as personal property, a lessee corporation is not entitled to a deduction on account of a building erected by it on the land of another.

7. — Taxation of Legacies and Succes- sions — Uniting Interests passing to One Beneficiary . . . 386

A statute amending G. L., c. 65, § 1, as amended, so as to provide that all interests in property passing or accruing to the same beneficiary, by any of the methods therein specified, shall be united and treated as a single interest for the purpose of determining the tax thereunder, would be constitutional.

8. — Income Tax — Gain received by Appointee under General Power 496

No estate is vested in the person appointed by the donee of a general power until the appointment is made.

A gain from the sale of securities received by trustees to whom property was appointed under a general power must be determined on the basis of its value at the time the property passed to them.

9. — Board of Appeal . . . 525

Under G. L., c. 58, § 27, as amended by St. 1922, c. 382, providing that the Commissioner of Corporations and Taxation, with the approval of the Attorney General, may abate certain taxes, in cases where they shall appear to have been illegally exacted, excessive or unwarranted, and that the decision of the Commissioner and Attorney General shall be final, no appeal lies to the Board of Appeal from the refusal of the Commissioner to grant relief under that provision.

10. — Exemption — Public Charity — Theatre . . . 572

The words "literary, benevolent, charitable and scientific institutions," in G. L., c. 59, § 5, cl. 3rd, cover, in general, the institutions which are within the equity of St. 43 Eliz., c. 4.

They do not, however, include religious institutions, which are dealt with elsewhere in the statute.

They do include educational institutions, such as schools, libraries, museums and lecture foundations, so long as the educational purpose is not subordinate to a dominant non-charitable purpose.

A theatre, not run for profit but upon a permanent foundation for the advancement of

TAXATION — Continued.

dramatic art, is an educational institution within the scope of this doctrine.

The land owned by such an institution, having been purchased with a view to removing the situs of the institution thereto, is exempt from local taxation, irrespective of occupancy, until such removal, but not for more than two years after such purchase.

11. — National Banks . . . 654
An act relative to taxation of banks and trust companies, subsequently enacted as St. 1925, c. 343, is constitutional.

12. — Retroactive Statute . . . 732
The general principle that statutes are not to be interpreted as retroactive in operation in the absence of a plainly expressed legislative intent to that effect, is applicable to statutes amending previous statutes.

In the event that G. L., c. 63, § 52, becomes operative, the laws revived thereby are revived as they were at the time of the enactment of Gen. St. 1919, c. 355, and not with subsequent amendments thereto.

13. — Income Tax — Authority of Commissioner with Reference to Certain Agreements as to Payment of Taxes . . . 741

The Commissioner of Corporations and Taxation has no authority to decline to enter into the agreement which may be filed with him under the provisions of G. L., c. 62, § 1 (e).

14. — Excise Tax — Tax upon the Sale of Gasoline for Consumption in the Operation of Motor Vehicles upon the Highways of the Commonwealth . . . 132
See CONSTITUTIONAL LAW.

15. — Taxation of National Banks and Other Moneyed Capital . . . 540
See CONSTITUTIONAL LAW.

16. — Review of Decision at Instance of Commissioner of Corporations and Taxation — Amendment to Decision . . . 724
See BOARD OF APPEAL.

TAXES — Interest — Computation of Time — Sunday . . . 721

Under G. L., c. 59, § 57, all Sundays are included in the computation of the seventeen-day period after which interest shall be added to unpaid taxes.

TEACHERS — Education — State Aid . 593
*See EDUCATION.***TEACHERS' RETIREMENT ASSOCIATION — Withdrawal of Membership — Refund — Retiring Allowance . . . 219**

A teacher who has not attained the age of sixty may withdraw from the public school service under the provisions of G. L., c. 32,

TEACHERS' RETIREMENT ASSOCIATION — Continued.

§ 11, and is entitled to receive from the annuity fund all amounts contributed as assessments, together with regular interest thereon; and having so withdrawn and received said refund, such teacher has thereby withdrawn entirely from the public school service.

G. L., c. 32, § 10, par. (2), provides for a mandatory retirement from service in the public schools by any member of the association on attaining the age of seventy years, and § 10, par. (1), permits a teacher between the ages of sixty and seventy to apply for retirement; and on retirement such a teacher has withdrawn from the public school service.

A voluntary member of the Teachers' Retirement Association sixty years of age or over, who has terminated his service as a teacher in the public schools, is not entitled to receive a refund of his contributions, but must accept the retiring allowance provided by the statute.

The phrase "any member," as used in G. L., c. 32, § 10, applies to voluntary members, i.e., teachers who entered the service of the public schools before July 1, 1914, and who have elected to become members of the association, as well as to teachers who entered the service of the public schools for the first time after July 1, 1914, and thereby *ipso facto* became members of the association by virtue of the provisions of section 7.

2. — Membership — Payment of Back Assessments in Instalments — Payments in Anticipation of Membership . . . 257

A rule of the Teachers' Retirement Board permitting a teacher who served prior to July 1, 1914, to join the association, paying his back assessments in instalments, is not consistent with law, and therefore is invalid.

G. L., c. 32, § 7, par. (3), defines the only terms upon which teachers who served in the public schools of Massachusetts prior to July 1, 1914, are permitted to become members of the State Teachers' Retirement Association at any time before attaining the age of seventy; and said statute contains no provision whereby an applicant for membership may make payments of back assessments in instalments.

No authority is granted by the statute creating the Retirement Board which permits the board to receive deposits from applicants in anticipation of membership.

3. — Membership . . . 554
Supervisors of adult alien education, employed under G. L., c. 69, § 9, are not teachers employed in a public day school, within the meaning of the teachers' retirement law.**4. — Reemployment of Retired Teacher . 630**
A retired teacher cannot be reemployed as a teacher, but is not ineligible for employment in some other capacity, providing the employer does not pay any part of the pension received by such retired teacher (G. L., c. 32, § 91).

TEACHERS' SALARIES — State Reimbursement 700

Towns are not entitled, under G. L., c. 70, § 1, to State reimbursement for salaries paid teachers on sabbatical leave.

2. — Constitutional Law — Reimbursement of Towns for Teachers' Salaries 500
See "ANTI AID" AMENDMENT. 3.

THEATRE — Taxation — Exemption — Public Charity 572
See TAXATION. 10.**THEATRE TICKETS** — Constitutional Law — Regulation of Resale of Tickets 442

Dealers in the resale of tickets to places of amusement may be required to be licensed.

The original price of such tickets may be required to be printed upon the face thereof.

The resale price of such tickets may be restricted to an advance of not over fifty cents above the original price.

2. — Resale — License — "Engaged in Business" 564

A person may be engaged in business even though service is rendered without charge to the customer and is a matter of accommodation to him.

Theatre tickets are not property in the ordinary sense but are primarily revocable licenses.

The term "reselling," as used in St. 1924, c. 497, should be construed as the transfer or disposal of a legal or equitable right to a ticket of admission, or to some other evidence of such right of entry, for a consideration.

Whenever any one makes a regular course of business of such transactions he becomes subject to the provisions of the act.

TITLE — Constitutional Law — Nature of Title acquired 644
See TAX SALES.**TITLE INSURANCE** — Contracts of Guaranty — Credit Insurance 532
See INSURANCE. 13.**TONTINE PLAN** — Foreign Life Insurance Company 480
See INSURANCE. 11.**TOWN CLERKS** — Duplicate Licenses 672
See DUPLICATE LICENSES.

2. — See MARRIAGE LICENSES. 728

TOWNS — Union Superintendent — Salary — State Reimbursement 683

The "valuation" of the several towns was last determined on or before April 1, 1925, under G. L., c. 4, § 7, cl. 35, and G. L., c. 58, §§ 9 and 10, as amended by St. 1921, c. 379, §§ 1 and 2. Accordingly, at the end of the school year on June 30, 1925, the valuation

TOWNS — *Continued.*

fixed on April 1, 1925, should be used as the basis for distribution of reimbursement authorized by G. L., c. 71, § 65.

2. — Grade Crossings — Refund of Interest 319
See GRADE CROSSINGS.

TOWNS AND CITIES — Reclamation Division — Land of the Commonwealth — Authority of Officials 559
See RECLAMATION DISTRICT. 1.**TRAFFIC REGULATIONS** — Traffic and Parking Regulations — Authority of Superintendent of Buildings 296
See STATE HOUSE GROUNDS.**TRANSPORTATION** — Classification of Pupils entitled to Reduced Fare 346
See SCHOOLS.**TRAVEL** — Compensation — Governor and Council 700
See GOVERNOR AND COUNCIL. 2.

2. — Medical Examination of Prisoners 749
See MEDICAL EXAMINATION OF PRISONERS.

TRAVELERS' CHECKS — Letters of Credit 317
See SAVINGS BANKS. 2.**TRAVELING EXPENSES** 393
See DISTRICT ATTORNEYS.**TRUST COMPANIES** — Meaning of Words "Capital Stock" 1

The words "the total amount of its capital stock," in G. L., c. 63, § 58, are intended to describe the amount of capital stock authorized, issued and paid in in cash.

So long as a trust company is not dissolved and is not prevented by the State itself from doing business, it is subject to the franchise tax imposed by G. L., c. 63, § 58.

2. — Increase of Capital Stock — Amendment of Original Charter 313

A trust company incorporated prior to 1888 may, by adopting G. L., c. 172, § 18, as provided in G. L., c. 172, § 3, increase its capital stock to any amount approved by the Commissioner of Banks, without the necessity of amending its original charter, even though that charter prohibited any increase of capital stock beyond \$500,000.

3. — Sale of Stock for Non-Payment of an Assessment 629

Under G. L., c. 172, § 25, stock cannot be sold for non-payment of an assessment within less than three months from the time of giving notice to the stockholder.

4. — Savings Department — Investments 200
See SAVINGS BANKS. 1.

TRUSTEE — Boston Elevated Railway Company — Trustee of an Estate holding Shares of the Capital Stock . . . 714
See BOSTON ELEVATED RAILWAY COMPANY. 5.

TUBERCULOSIS HOSPITALS — Apportionment of Cost . . . 410

In providing for an apportionment of the cost of a public undertaking among cities and towns or other political subdivisions of the Commonwealth benefited thereby, and also in shifting the burden thereof, the Legislature has a large measure of discretion, the exercise of which is not subject to judicial control, on constitutional grounds, unless it is purely arbitrary.

A statute changing the previous law by including in the district served by the Essex County Tuberculosis Hospital cities previously exempted, and requiring them to bear a part of the burden of the cost of its construction and maintenance, apportioned in a way which, under all the circumstances, would be fair and reasonable, would be constitutional.

UNDERTAKERS — Constitutional Law — Licenses — Registered Embalmers . . . 400

A statute limiting the issuance of undertakers' licenses to registered embalmers would be unconstitutional.

The presumption of constitutionality does not attach to a bill not yet enacted into law.

UNITED STATES PUBLIC HEALTH — Regulations of Health Service 731
See PUBLIC HEALTH. 2.

VACCINATION — Unvaccinated Child — Admission to Public Schools — Proof of Vaccination . . . 370

Vaccination, in its statutory meaning, is the operation known as vaccination properly performed. A successful operation is not required to constitute vaccination.

An unvaccinated child, within the purview of the statute, is a child upon whom the operation known as vaccination has not been properly performed.

Visible evidence that vaccination has been successfully performed is not a necessary requirement for the admission of a child to a public school.

Proof that a child has been properly vaccinated may be required before admission to a public school.

Mere verbal changes in the revision of a statute do not alter its meaning.

VENUE OF CRIMES — Jurisdiction — Vicinity . . . 119
See CONSTITUTIONAL LAW. 11.

VEHICLE — Vehicle with Its Load weighing more than Fourteen Tons — Permit to travel on a Public Way — Maximum Load — Construction of Statutes . . . 599

VEHICLE — *Continued.*

A permit is required in each instance for a vehicle, which with its load weighs more than fourteen tons, to travel on a public way.

The permit need not, but may, specify the ways over which such vehicle shall travel.

The Division of Highways may, by rule, establish a maximum weight of load at less than fourteen tons but not at more than fourteen tons.

Mere verbal changes in the revision of a statute do not alter its meaning.

The meaning of words in a statute must be determined from the context, the general intention of the Legislature and the purpose to be accomplished.

VETERAN — State Employee — Removal — Hearing — State Infirmary — Civil Service . . . 90

The services of a State employee who is a veteran, but whose employment has not been approved by the board of trustees of the State Infirmary as required by G. L., c. 122, § 1, and who is not employed as the result of an appointment under civil service provisions, may legally be discontinued without hearing.

2. — Civil Service — Service in the Army or Navy of the United States — Discharge from Draft 194

A person is not a "veteran," within the meaning of G. L., c. 31, § 21, who was discharged from the draft at Camp Devens, on October 12, 1917, by reason of physical disability, such person having been inducted into the service from the jurisdiction of the local board for No. 21, Boston, on October 1, 1917.

Discharge from the draft is not the equivalent of an honorable discharge from service in the Army of the United States.

3. — Settlement — "Actually resided" 341

Under St. 1922, c. 177, the place of settlement of a person inducted into the military forces of the United States under the Federal Selective Service Act is the place where he "actually resided" or was living at the time of his induction, as distinguished from the place of legal residence or domicile.

4. — Dependents — Re-enlistment in Time of Peace — Honorable Discharge — Dishonorable Discharge 225
See SOLDIERS' RELIEF.

5. — Public Service — Preference of Veterans and Citizens . . . 570
See BOSTON ELEVATED RAILWAY COMPANY. 4.

6. — Exemption of Veteran Organizations from License Fees . . . 596
See CONSTITUTIONAL LAW. 26.

7. — Pensions for Veterans — "Compensation" . . . 646
See STATE RETIREMENT ASSOCIATION. 4.

VETERAN — *Continued.*

8. — Brokers' License Fees — Partnership and Corporation Licenses — Veteran's Exemption . . . 648
See INSURANCE BROKER.

- VOLSTEAD ACT** — State Police — Power conferred on State Officers by Congress . . . 506
See STATE POLICE.

- VOTERS** — Submission to Voters of a Question of Public Policy — Majority of All the Votes cast . . . 583
See PUBLIC POLICY.

- WAR BONUS FUNDS** — Surplus Bonus Funds returned to Cities and Towns — Use for a Library Building . . . 597

A town cannot legally vote to hold the surplus bonus funds received under St. 1924, c. 480, as a fund for the erection of a library building, under G. L., c. 44, § 8, par. (7), in the absence of any evidence that said library building is intended as a memorial to soldiers, sailors and marines.

- WAREHOUSEMEN** — Revocation of License on Discontinuance of Business . . . 659

When a public warehouseman discontinues business and cannot be located, his license may be revoked. The Secretary of the Commonwealth may proceed on the bond to recover the expense of publishing notice of revocation.

- WATER** — Municipal Corporation — Water furnished without Charge to a Private Concern . . . 641
See MUNICIPAL CORPORATION.

- WAYS** — Constitutional Law — Protection of Reservations of Ways not laid out — Damages . . . 638

A statute authorizing cities and towns to provide for the reservation for public use of ways not laid out, allowing landowners to recover damages for property taken, except damages for injury to any improvement constructed after the vote to reserve, and providing that the city or town may abandon the reservation, would be constitutional.

- WILL OF THE PEOPLE** — An Act to ascertain — Eighteenth Amendment — Public Money . . . 109
See CONSTITUTIONAL LAW.

- WITNESS FEES** — Expert Witnesses — Compulsory Prices — State Officers and Employees — Compensation . . . 426

The term "witness fee" applies to any sum of money paid to persons subject to compulsory process as compensation for testimony given at the trial of causes.

WITNESS FEES — *Continued.*

Expert witnesses may in all cases be compelled to appear and testify to such opinions as they may have. Such witnesses cannot be compelled to make a previous study of the case or of other testimony.

State police officers and officers and employees of the Commonwealth receiving regular compensation therefrom may not receive any compensation for testifying in a cause in which the Commonwealth is a party.

Such persons may receive from counties compensation for services which they are not by law compelled to render.

Such persons may not receive from the Commonwealth compensation for special services unless such services are performed outside of usual working hours and are not required in the performance of their duties.

2. — Metropolitan Police Officer — Expenses as Witness — Reimbursement . . . 399
See METROPOLITAN POLICE.

- WOMEN** — Re-registration — Mass. Const. Amend. LXIX . . . 694
See NOTARIES PUBLIC.

- WOMEN AND CHILDREN** — Laundries of Private Boarding Houses and Hospitals — Eight-hour Day — Engineers — Laundries at State Hospitals . . . 145
See HOURS OF LABOR.

2. — "Overtime Employment" — Legal Holiday . . . 681
See HOURS OF LABOR.

- WORKMEN'S COMPENSATION** — Injured Employee — Retirement . . . 307
See STATE RETIREMENT ASSOCIATION.

- WRENTHAM STATE SCHOOL** — Admission and Discharge of Pupils or Other Inmates . . . 207

The Trustees of the Wrentham State School are not authorized to receive those who themselves ask admission.

The trustees are authorized to receive those for whom application is made by parent or guardian.

Such parent or guardian has no right to take away such person from the school without the consent of the trustees, except upon application to the court.

If in the opinion of the trustees inmates over the school age will receive benefit from school instruction, the trustees are authorized to place such inmates in the school department.

A minor placed in the school by his parent or guardian may be discharged after reaching his majority only in the discretion of the trustees or upon application to the court.

A minor committed to the school may be held in the custody of the school after reaching his majority without a recommitment.

